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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 638

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

Petitioner

vs.

GILMER S. MORRIS,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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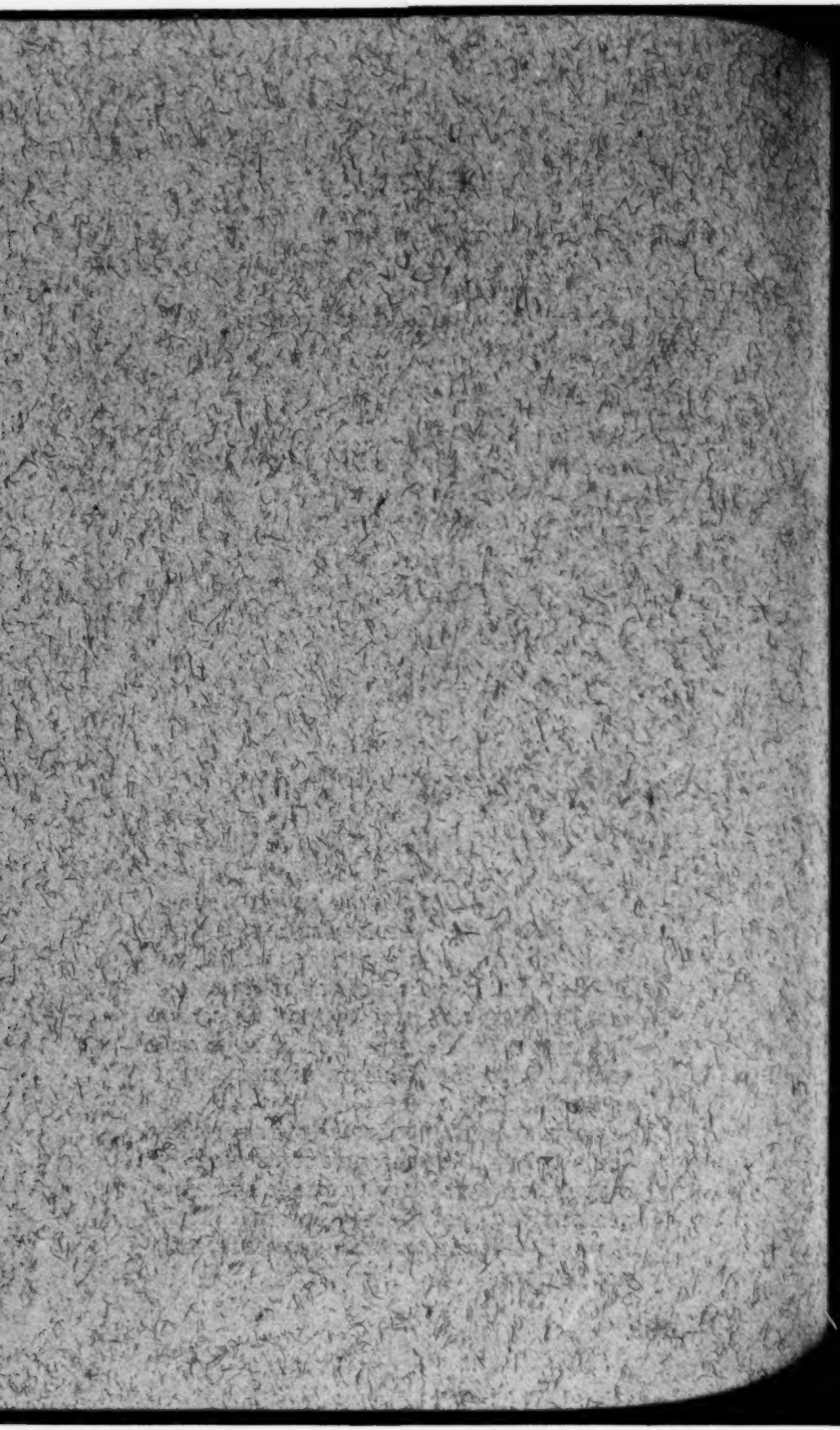

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MAY IT PLEASE THE COURT:

Petitioner, The Chesapeake and Ohio Railway Company, respectfully shows unto this Honorable Court that it is aggrieved by a final judgment of the United States Circuit Court of Appeals for the Seventh Circuit, entered on the 14th day of December, 1948, and the denial of its petition for a rehearing on the 10th day of January, 1949, in cause numbered 9565 on the docket of said Court, affirming a judgment of the District Court of the United States for the Northern District of Indiana, South Bend Division, ordering Petitioner to place the name of Respondent on its

seniority list of train dispatchers in the Peru territory before the name of H. B. Middlekauf and assign to him the seniority date on said list of June 3, 1945.

Summary Statement of the Matter Involved

The Proceedings

The case was brought under the Selective Training and Service Act of 1940, as amended, upon which the jurisdiction was based. In his amended complaint, respondent alleged his employment by the petitioner as a telegrapher on January 12, 1940, his continuation in such employment until his induction into the Navy on July 26, 1944, his honorable discharge from the Navy on May 15, 1946, the resumption of his employment with the petitioner as a telegrapher on June 6, 1946, his qualification for and promotion to the position of train dispatcher on July 31, 1946, and that the circumstances of the petitioner had not so changed as to make it impossible or unreasonable for him to be reinstated to a position of proper seniority and pay.

He further alleged that a contract between the petitioner and the telegraphers, providing that "when additional train dispatchers are needed, the positions will be advertised to all employees of the present telegraphers' seniority territory" gave him fixed rights to promotion to the position of a train dispatcher in conformity with his seniority, and that in addition to his rights under such contract he was entitled to the relief prayed for by virtue of a usage that all dispatchers were taken from the roster of telegraphers according to the highest seniority of the telegraphers.

He then alleged that while still in the the Navy, upon receipt of an advertised bid, he entered his bid for a dispatcher position, stating his approximate date of discharge, that the bid was accepted pending his becoming qualified, that upon his return from service he spent five hours each

night for three weeks under the supervision of a dispatcher for the purpose of assuring that he could qualify as a dispatcher, and that on August 3, 1946, he commenced, and was still working, as a dispatcher.

He complained, however, that while he was in the Navy three other employees, with telegrapher seniority junior to his, were advanced to the position of dispatcher, the first of them, one Middlekauf, on June 3, 1945, and he asked that he be given seniority as a dispatcher ahead of them.

The petitioner answered, admitting many of the allegations of the complaint, but alleging that it had reinstated the respondent in the position and with the seniority which he held when he left its service, and that it was not possible to grant him seniority rights as a dispatcher dating from any date prior to August 3, 1946, for the reason that by so doing it would violate collective bargaining agreements, negotiated pursuant to the Railway Labor Act, with the Order of Railroad Telegraphers and the American Train Dispatchers' Association, by which latter agreement the seniority of its dispatchers was exclusively governed. The answer admitted that two of the three employees, who were advanced to dispatcher positions in his absence, had telegrapher seniority junior to the respondent's, but alleged that one of them, Knipp, had telegrapher seniority dating from December 13, 1916. The answer denied that the contract with the telegraphers or any usage gave the respondent the seniority as a dispatcher which he claimed.

The case was tried by the court without a jury (166). At the conclusion of the plaintiff's evidence, the petitioner moved for a dismissal for the reason that, upon the facts and the law, the respondent had shown no right to relief. This motion was overruled with the understanding that it might be reasserted at the conclusion of all the evidence (37, 166). It was so renewed and taken under advisement,

together with the entire cause (54, 166). The court submitted findings of fact, an opinion, conclusions of law, and a judgment to the effect that petitioner place the respondent's name on its seniority list of train dispatchers before the name of H. B. Middlekauf and assign him the seniority date thereon of June 3, 1945 (167-173).

An appeal was duly prosecuted to the Circuit Court of Appeals which affirmed the judgment of the District Court with an opinion appearing on page 186 of the record, a copy of which record, including all proceedings in the District Court and the Circuit Court of Appeals, is filed herewith under separate cover.

The Facts

The petitioner employs both train dispatchers and telegraphers, the former pursuant to an agreement between the petitioner and its train dispatchers as represented by the American Train Dispatchers' Association (139), and the latter pursuant to an agreement between the petitioner and its telegraphers, as represented by the Order of Railway Telegraphers (59). The duties of a train dispatcher and a telegrapher are distinct and different. A dispatcher issues the train orders; he supervises the movement of the trains; he is required to be constantly at his work, know the location of the trains, know the running times, and know the capabilities of the engine in regard to the loads and empties the engines can move in their trains. He determines and controls the time when every train on his territory shall pass a certain place or meet or pass other trains. He is required to exercise a great deal of judgment and discretion (53). The telegrapher works under the supervision of the train dispatcher. He operates the manual block system, copies train orders received from the dispatcher over the telephone or telegraph and delivers them to those in charge of the operation of the trains as directed by the dispatcher.

His duties are largely routine, without his being required to exercise any particular judgment or discretion (52, 53).

The petitioner maintained lists known as seniority rosters of both train dispatchers and telegraphers showing the respective seniority of both classes of employees. These were issued and furnished to train dispatchers and telegraphers on July 1st of each year (18, 113-137). Although the roster of dispatchers and the roster of telegraphers are issued at the same time and for convenience on the same form (49), they are entirely separate and distinct rosters. When a man hires as telegrapher, his name is placed on the seniority roster the day that he is first paid for that service (49). A dispatcher establishes his seniority on the date he is first paid for that service (43). Dispatchers who have been telegraphers retain their seniority as telegraphers after they become dispatchers. Such seniority appears on the telegraphers' seniority roster (113-137), which is separate and distinct from the dispatchers' roster.

Rule 20(a) of the agreement with the telegraphers provides that "When additional extra train dispatchers are needed, the positions will be advertised to all employees on the present telegraphers' seniority territory" (17, 70, 167). Pursuant to the provision quoted, when there is need of additional dispatchers, the company issues a bulletin to all telegraphers who are then in the telegraphers' seniority territory, the same being the Chicago Division between Cincinnati and the "K. D." office at Chicago (27, 28, 39, 40, 168). The positions are so "advertised" only when there is need of dispatchers, and it is stated in the advertisement that applicants will be expected to come to Peru and qualify immediately. The company sends advertisements (bulletins) to those who are on the seniority roster only when they are actually on the seniority territory. Telegraphers who are absent, on leave or furlough, or sick receive no such bulletins from the company (29, 39, 40).

After these advertisements or bulletins are sent out, the oldest telegraphers bidding on them are "assigned," which means that they are given an opportunity to take the necessary examinations and otherwise qualify, if they can, for promotion to the position of dispatcher. In other words, the opportunity to take the examination and to qualify is accorded to telegraphers who apply in the order of their seniority. There is nothing automatic in the promotion from telegrapher to dispatcher, that is, the oldest telegrapher who applies is not always appointed a dispatcher. The applicant must take an examination and qualify before he is entitled to promotion (28, 30, 40, 168). A Rules Committee, made up in part of men from other divisions of the system and having no particular knowledge of the physical situation on the Chicago Division, conducts an examination solely with reference to the Rules. If an applicant successfully passes the examination on the Rules, he is then required to go over the division for which he will dispatch trains to learn the physical characteristics of the railroad; he sits in with train dispatchers, under their supervision, and learns how to issue train orders, check trains, and the various other duties of a train dispatcher. This is called working on the sheet—a large sheet of paper on which the different trains are listed, together with their times at different stations (40, 41). If, after he has qualified on the Rules, has gone over the road, and has sat in on the sheet to learn the various duties, he convinces the Chief Dispatcher that he has the ability to do that type of work, he is permitted to work as a dispatcher the first time an additional dispatcher is needed. He thus establishes his seniority as dispatcher on the date he is first paid for that service (43).

In numerous instances senior men on the telegraphers' roster have applied and have been turned down, either by the Rules Committee or the Chief Dispatcher, and the position has been given to an employee who was qualified, notwithstanding the fact that such other employee was junior on the telegraphers' roster (34). If a telegrapher takes the examination and fails to pass the Rules examination, or fails to convince the Chief Dispatcher that he has the ability to do the work required of a dispatcher, he remains a telegrapher but may again at a later date put in his bid, take the examination, and attempt to qualify as dispatcher; however, in no case does he get on the dispatchers' seniority roster until he has so qualified (30, 31, 42, 43).

At the time of the promotion of each telegrapher who was promoted to the position of train dispatcher from and after July 1, 1942, there were respectively all the way from 22 to 144 telegraphers on the telegraphers' roster who had seniority thereon ahead of the telegraphers who were so promoted to dispatchers (42, 43, Defendant's Exhibit 3, 165).

A number of these telegraphers had attempted to qualify for promotion to the position of dispatcher but had failed to do so (41, Defendant's Exhibit 1, 163).

There were eight telegraphers who had taken the examination, attempted to qualify, and failed to do so but who had later successfully taken the examination and qualified and been promoted to the position of dispatcher (42, Defendant's Exhibit 2, 164).

Rule 5 of the agreement between the petitioner and the *dispatchers* provides as follows:

> (a) Seniority as dispatcher, will date from date employe passes the required examination and qualifies as dispatcher. Where more than one employe on a dispatcher's seniority territory is examined and qualifies as dispatcher on the same day, their seniority dates as

dispatcher will be in the order of seniority they held on the telegraphers' roster. Each employe examined as dispatcher, when qualified, will be given a certificate of qualification showing seniority standing.

(b) In filling vacancies in positions as dispatcher seniority shall be observed and the senior applicant will be given the position if he has the necessary ability (149, 168).

It will thus be seen that Rule 5 (a) relates to the manner in which an applicant may become a dispatcher—i.e., get his name on the roster of dispatchers; while Rule 5 (b) relates to the right, as between those on the dispatchers' roster, to bid in a particular job.

The respondent entered the employ of the petitioner as a telegrapher on January 12, 1940 and was given seniority as a telegrapher as of that date. He continued in such employment until he entered the military service on July 26, 1944. He continued in the military service until May 17, 1946, on which date he was honorably discharged. He was out of the country and in the Caroline and Marshall Islands in the South Pacific from April 27, 1945 until September 28, 1945. On June 7, 1946, he returned to the employ of the petitioner and assumed the duties of a telegrapher which he had left when he entered the military service (13, 14, 67). While respondent was yet in the service and stationed at Santa Ana, California, Owen E. Miller, the local Chairman of the Order of Railroad Telegraphers, acting as a personal friend of respondent, and not under any authorization by the company, mailed respondent a bulletin or advertisement for two extra train dispatchers and asked him to submit the bid to the Chief Dispatcher (14, 15, 168). It is the practice of the company to mail bids only to telegraphers who are on the territory, and, in instances other than that of the respondent, the company has refused bids of telegraphers

because they were not on the territory, but in the case of the respondent the company accepted the bid and permitted him to take the examination (29, 31, 168). He took the examination for the position of dispatcher on July 24, 1946 (14, 168) after having spent five hours each night for three weeks in learning the duties of a dispatcher, and he qualified and was promoted to the position of extra train dispatcher and assigned seniority as a dispatcher under and as of the date of August 3, 1946 (15, 57, 137, 168).

There were three occasions while respondent was in the service when a dispatcher's job was open in the territory. Respondent was then in the Marshall or Caroline Islands, and he was not notified of the vacancies (16, 168). The positions were filled by Middlekauf, Adkins, and Knipp. Middlekauf, with telegrapher seniority as of August 17, 1942, was promoted to the position of train dispatcher and assigned seniority as such as of June 3, 1945, and Adkins, with telegrapher seniority as of November 10, 1943, was promoted to the position of train dispatcher and assigned seniority as such as of August 25, 1945. Knipp, with telegrapher seniority as of December 13, 1916 (20, 21, 168), had been an extra dispatcher, possibly as early as 1926, and was still working as such when the respondent was first employed. He later resigned as train dispatcher, but subsequently bid again and was qualified and assigned the seniority date as a dispatcher as of May 16, 1946 (20, 21, 22, 48, 168). There came a time, however, while respondent was still in the Navy, when there was another vacancy, and Miller sent him the bid which he received while at Santa Ana. That was the vacancy which was held open for him until he came back and qualified for it, and was the one which he eventually filled (35, 36). Miller mailed no bids to any men other than the plaintiff who were in the armed forces (27).

The Jurisdiction

The Supreme Court has jurisdiction to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit pursuant to Title 28, Section 347 of the United States Code (Judicial Code, Section 240, amended).

The Question Presented

The question presented is as follows: Is a returning veteran, who has been restored to the identical position and seniority in a classification (craft) which he occupied at the time of his induction and has subsequently been promoted (transferred) to a higher classification (craft) as a result of his then demonstrating his qualifications by examination and trial, entitled by virtue of the Selective Training and Service Act of 1940, to seniority in such higher classification (craft) over those who, though junior to him in the lower classification (craft) have qualified for a promotion (transfer) to such higher classification (craft) and been promoted (transferred) to such higher classification (craft) in his absence, notwithstanding the fact that the collective bargaining agreement which creates and regulates seniority in such higher classification (craft) provides that seniority in such higher classification (craft) shall not commence until after the employee qualifies for promotion (transfer) to such higher classification (craft) by taking the required examination and demonstrating his ability to do the required work?

Reasons Relied on for Allowance of the Writ

Petitioner relies, for allowance of the writ, upon these reasons:

(a) The Circuit Court of Appeals has decided the Federal question presented and hereinabove stated in a way

which conflicts with applicable decisions of the Supreme Court. The decision of that question in the affirmative is in conflict with the decision of this Court in *Fishgold* v. *Sullivan Drydock & Repair Corporation*, 328 U. S. 275, in this:

(1) Such decision is to the effect that under the facts here appearing the Selective Training and Service Act of 1940, 54 Stat. 885, c. 720, 50 U. S. C. Appx. Sec. 301, grants to a returning veteran, not merely his former position, with like seniority, status and pay as he enjoyed at the time of his departure, but upon his subsequent promotion to a higher position, a step-up or gain in seniority over those who, though junior to him in the lower position, qualified for and thereupon were promoted to the higher position in his absence, notwithstanding the fact that his seniority, including that accumulated during his period of service, was not alone sufficient to entitle him to promotion ahead of them. This court has held in the *Fishgold* case that no such step-up or gain in priority can be fairly implied.

(2) Such decision is to the effect that, under the facts here appearing, the respondent shall be given seniority as a dispatcher as of June 3, 1945, notwithstanding the fact that he did not pass the examination and qualify for that position until August 3, 1946, thereby overriding an entirely valid collective bargaining agreement creating dispatcher seniority and providing that it shall date from the time when the employee passes the examination and qualifies. This Court has held in the *Fishgold* case that Congress did not seek to sweep aside the seniority system, but on the contrary recognized such systems and rights thereunder and undertook to give the veteran protection within their framework.

(b) The decision of the Circuit Court of Appeals is in conflict with the decisions of other Circuit Courts of Appeals on the same matter, namely:

The decision of the Circuit Court of Appeals for the Sixth Circuit in: *Raulins* v. *Memphis Union Station Co., et al.*, 168 F. 2d 466, and the decisions of the Circuit Court of Appeals for the Fifth Circuit in: *Rose* v. *Texas & N. O. R. Co.*, 171 F. 2d 458, and *Harvey* v. *Braniff*, 164 F. 2d 521. These decisions hold that under agreements and factual situations substantially identical with those in the instant case, that is, where promotion to a higher position is not a fixed right flowing from seniority alone, a returning veteran may not claim seniority in the higher position over those who, though junior to him in the lower position, have been promoted in his absence as a result of a demonstration of their qualifications.

(c) If the Court should conclude that the question, stated under the heading "The Question Presented" and decided by the Circuit Court of Appeals in the affirmative, has not been settled by this Court, it should be so settled, as it is a question of Federal law which is frequently arising and is of great importance to veterans, labor and management.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

By ALBERT H. COLE,
Counsel for Petitioner

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Opinions of the Courts Below

The opinion of the District Court is reported in 75 F. Supp. 429, that of the Circuit Court of Appeals in 171 F. 2d 579. The opinions appear in the Record at pages 169 and 186 respectively.

II

Jurisdiction

The suit involves the construction of a federal statute, namely the Selective Training and Service Act of 1940, as amended, 50 U. S. C. A. App. § 301, et seq. and jurisdiction is here invoked pursuant to Title 28, Section 327 of the United States Code, Judicial Code, Section 240, amended.

III

Statement of the Case

A statement of the case having been made in the petition, in the interest of brevity it will not be here repeated.

IV

Specification of Errors

The error intended to be urged is the error of the District Court in its Conclusion of Law No. 2 and the judgment thereon rendered, the affirmance of that judgment by the Circuit Court of Appeals both resulting from the affirmative answer of those courts to the question stated under the heading "The Question Presented" in the foregoing petition.

Argument

(a)

(1) Respondent alleged that a contract between the petitioner and the Order of Railway Telegraphers, of which he was a member, conferred upon him fixed rights to promotion from the position of telegrapher to that of dispatcher in conformity with his seniority. The provision relied upon is of this tenor:

> "When additional train dispatchers are needed, the positions will be advertised to all employees on the present telegraphers' seniority territory."

This provision gave him no fixed right to promotion on the basis of his seniority. By its terms it did no more than to provide for notice of openings. He further alleged, however, that, by an established usage, all dispatchers were taken from the roster of telegraphers according to the highest seniority of telegraphers in petitioner's employ. There was not, and in the nature of things, could not have been, any such usage. The duties of the two positions are so divergent, and the discretion required to be exercised and responsibility required to be assumed by a dispatcher are so great that it never could be assumed that either innate ability or experience in the routine duties of a telegrapher could qualify him for the position of a dispatcher. As a matter of fact, many senior telegraphers continued as such when those junior to them were promoted to dispatcher and a considerable number of senior telegraphers sought promotion and failed to qualify. Some of them later successfully sought promotion, showing that from the mere fact of one's qualification at one time, it does not necessarily follow that he would have qualified at an earlier date.

The practice which prevailed was not in dispute. Pursuant to the provision we have quoted, notice of a vacancy

or opening in the position of dispatcher was given to telegraphers on the telegraphers' seniority territory. This did not include those who were absent, on leave or furlough, or sick. Those on the territory were given the right, in the order of their seniority, to submit to an examination on the rules. If they successfully passed the examination they underwent a period of trial training and if they satisfied the chief dispatcher as to their ability to do the work required of dispatchers they were "qualified" and received their promotion. Seniority as dispatcher dated from the date they passed the examination and qualified as dispatcher. Manifestly neither the contract nor the practice conferred seniority as a dispatcher upon the respondent prior to the date on which he qualified for that position.

There is nothing in the Selective Training and Service Act of 1940 which entitles him to seniority as of an earlier date. Section 8 (b) provided that he should be restored to the position which he left or to a position of like seniority, status and pay. He was a telegrapher when he entered the service and upon his return he was restored to the identical position which he left and with all of the seniority which he held when he went into the military service.

Nor does Section 8 (c) of the Act entitle him to the seniority which he claims. That section provides that a person who has been restored to his position in accordance with Section 8 (b) shall be considered as having been on furlough or leave of absence during his period of military service, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was ordered into such service, and shall not be discharged from such position without cause within one year after such

restoration. Respondent was restored to his former position without loss of seniority. He has been denied no participation in insurance or other benefits offered to employees on furlough or leave of absence. On the contrary he has been accorded preferential treatment in this respect. Those on furlough or leave of absence were not entitled to notice of vacancies in the position of dispatcher. While respondent was yet in the service, but expecting shortly to be discharged, petitioner accepted a bid which he submitted and held it open until after his return and then permitted him to be examined and qualify. In no other instance was such a privilege accorded to a telegrapher off the territory (29, 31). Respondent has not been discharged. There has accordingly been a full compliance with all applicable provisions of Section 8 (c).

While the Act is to be liberally construed in favor of returning veterans such construction does not contemplate that one who has been accorded every benefit which the act, by its terms, confers, shall, upon his subsequent promotion to a higher position, be given a step-up or gain in seniority over those who were promoted to the higher position during his absence, where promotion does not automatically flow from seniority alone, but is attained only if the applicant can demonstrate that he has both the ability and knowledge requisite for the higher position. Such in effect, is the holding of this court in the *Fishgold* case, where it is said:

> "As we have said, these provisions guarantee the veteran against loss of position or loss of seniority by reason of his absence. He acquires not only the same seniority he had; his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence. But we would distort the language of these provisions if we read it as granting the veteran an increase in seniority over what he would have had if he had never entered the armed

services. We agree with the Circuit Court of Appeals that by these provisions Congress made the restoration as nearly a complete substitute for the original job as was possible. No step-up or gain in priority can be fairly implied. Congress protected the veteran against loss of ground or demotion on his return. The provisions for restoration without loss of seniority to his old position or to a position of like seniority mean no more."

(2) The seniority of dispatchers is created and governed by the Dispatchers' Agreement, Rule 5 (a) of which provides that:

> "Seniority as dispatcher will date from date employe passes the required examination and qualifies as dispatcher. Where more than one employe on a dispatcher's seniority territory is examined and qualifies as dispatcher on the same day, their seniority dates as dispatchers will be in the order of seniority they held on the telegraphers' roster."

Under no circumstances is seniority as a dispatcher established by the telegraphers' agreement. The dispatchers' agreement, under which alone seniority as a dispatcher can be acquired, recognizes telegrapher seniority only in the single instance where more than one person qualifies as dispatcher on the same day.

Rule 5 (b) provides that:

> "In filling vacancies in positions as dispatcher seniority shall be observed and the senior applicant will be given the position if he has the necessary ability."

This provision has no reference to promotion from the position of telegrapher to that of dispatcher and the seniority thereby acquired. That matter is covered exclusively by Rule 5 (a). Rule 5 (b) relates exclusively to the filling of particular positions as dispatcher by those who have already

become dispatchers. For instance, if there is a vacancy in the position of dispatcher for a certain trick in the dispatchers' office in Peru, the applicant having the highest seniority as a dispatcher will be given the position if he has the necessary ability. Such seniority as a dispatcher is created and governed by the dispatchers' agreement providing that it will date from the date the employee passes the required examination and qualifies as a dispatcher. The granting to the respondent, who qualified on August 3, 1946, of seniority as of June 3, 1945 directly contravenes the very contract under which alone such seniority exists.

The contract in question is not in conflict with the Selective Training and Service Act, and it was not the intention of Congress to sweep aside such a seniority system as it created. Indeed, the intention of Congress was quite to the contrary. As was said by this court in the *Fishgold* case, 328 U. S. 275, 288 (May 27, 1946):

> "Congress recognized in the Act the existence of seniority systems and seniority rights. It sought to preserve the veteran's rights under those systems and to protect him against loss under them by reason of his absence. There is indeed no suggestion that Congress sought to sweep aside the seniority system. What it undertook to do was to give the veteran protection within the framework of the seniority system plus a guarantee against demotion or termination of the employment relationship without cause for a year."

At the time of his induction the respondent's rights were governed solely by, and his seniority existed solely under the framework of, the telegraphers' contract. Upon his return he was restored to his former position with his seniority unimpaired. There was a complete compliance with the provisions of the Act so far as any rights under that contract were concerned.

He now seeks to be accorded rights under a different seniority system, which was created by a different contract, which had no connection with his own service at the time of his induction, and in direct violation of the seniority provisions of that contract. To permit this to be done would open the door for the courts "to sweep aside the seniority system." One instance of the chaotic condition which would result is shown in the instant case by the situation of Knipp. His telegrapher seniority dates from December 13, 1916. Middlekauf and Adkins, who became telegraphers in 1942 are both senior to him on the dispatchers' roster because they qualified as dispatcher before he did, and under the express provisions of the dispatchers' agreement their seniority dates from the date they passed the required examination and qualified as dispatcher. The District Court directed that the defendant place the respondent's name on the roster of dispatchers ahead of Middlekauf, which automatically gives him seniority ahead of Adkins and Knipp as well. We find, therefore, that, solely by reason of the court's adoption of respondent's contention that, as between respondent and Middlekauf and Adkins, seniority as dispatcher must conform to seniority as a telegrapher, he stands above Knipp on the dispatchers' roster although Knipp became a telegrapher more than twenty-three years before respondent did and qualified as a dispatcher some fourteen months before the respondent did. Such a situation sweeps aside the seniority system. The respondent is not entitled to have this done. He is entitled to protection within the framework of the seniority system, and this he has been given.

This court has not receded from the position taken in the Fishgold case but, on the contrary, has adhered to the principles therein announced in

Trailmobile Company, et al vs. Whirls, 331 U. S. 40 (April 14, 1947)

(b)

The decision of the court below in the instant case is in conflict with the decisions of every other Circuit Court of Appeals on the same matter.

Squarely in point is the decision of the Circuit Court of Appeals for the Sixth Circuit in the case of Raulins vs. Memphis Union Station Company, 168 Fed. 2d 266 (June 1, 1948). Raulins and Rogers were employed by the defendant as electrician-helpers. They entered the Navy, were honorably discharged and reemployed as electrician-helpers. They were subsequently promoted to the position of electrician, one of higher wages and requiring a higher grade of technical ability than that of electrician-helper. While they were in the armed forces Turner and Black, junior to them as electrician-helpers, were promoted to the position of electrician and were retained in that position when Raulins and Rogers were later reduced to electrician-helpers. The alleged preferential employment of Turner and Black to the prejudice of Raulins and Rogers was the basis of the suits. The plaintiffs claimed that if they had remained in defendant's employ, instead of inducted into service, they would have received the promotion to electrician in preference to Turner and Black. They based their claims upon a collective bargaining agreement and upon an alleged custom of filling vacancies in the position of electrician by appointment of those having the highest seniority in the position of electrician helpers. Not only were the facts identical with those in the instant case, but the collective bargaining agreement embraced all that is here claimed to be spelled out both by contract and usage. It was there provided:

> "Rule No. 12. New Positions and Filling Vacancies.
> "(1) New jobs created or vacancies in respective crafts will be bulletined for five (5) days and the

> oldest employees in point of service shall, if sufficient ability is shown by fair trial, be given preference in filling such jobs or any vacancies that may be desirable to them, unless the Management and the Committee agree that the senior bidders are not qualified. • • •"

The Court held Raulins and Rogers were not entitled to relief. It said:

> "The Collective Bargaining Agreement does not make promotion from electrician-helper to electrician in case of vacancy an automatic one. It plainly provides application on the part of the electrician-helper, proof of his qualification for the promotion by actual trial, and for a return to his former position as electrician-helper with full seniority rights if he fails to qualify after a reasonable trial."

The plaintiffs relied upon certain statements of this court in the Fishgold case to the effect that one called to the colors was not to be penalized by reason of his absence from his civilian job, and that he does not step back on the seniority escalator at the point he stepped off but at the precise point he would have occupied had he kept his position continuously during the war. The court said:

> "We think it clear, however, that such expressions were dealing with the question of seniority, the veteran's retention of it while absent, and his increased seniority *through the passage of time* upon his return to his former position. No other rights were involved in that case. The expressions are not logically susceptible of the construction that the Act guaranteed to the veteran while in service any rights which he might possibly have been able to obtain, although by no means a certainty, if he had been working on the job instead of being in the service. The Court made this plain when it said, 'He is thus protected against receiving a job inferior to that which he had before entering the armed services,' and, 'As

we have said, these provisions guarantee the veteran against loss of position or loss of seniority by reason of his absence.' Our construction of the Act and of the ruling in *Fishgold* v. *Sullivan Drydock and Repair Corporation, supra,* is in accord with other decisions of the Federal courts." (Our emphasis.)

The court below attempted to distinguish the instant case from the Raulins case on the sole ground that in the latter case there was no "custom that electricians must come from the ranks of the electrician-helpers, because the evidence showed that two men who were not electrician-helpers were employed during the war as electricians." It will be noted from the opinion in the Raulins case that "Appellants do not complain of these employments, and do not ask for seniority rights ahead of them." Of course, their employment, if electrician-helpers bid for the jobs and demonstrated their qualifications, was a direct violation, not of a mere custom, but of an express provision of a written contract. It is of no particular consequence that there was no custom that electricians must come from the ranks of electrician-helpers, when there was an express contract to that effect, provided that any electrician-helper bid and proved himself qualified for the job. In view of the failure of the plaintiffs in the Raulins case to complain of the two men not previously employed, only one inference can be drawn. That is that at the time of the employment of these men no qualified electrician-helpers applied for the jobs and the employer was free to obtain electricians where it could. There is nothing in any contract or custom in the instant case which would have prevented the respondent, during the war, from hiring a dispatcher from outside the ranks of its own employees, if no telegrapher bid on the job and demonstrated his qualifications. No contract or custom would have required the respondent to do without the services of a needed dispatcher, nor employ in that respon-

sible position a man not qualified to perform its duties. It is true that it did not happen to occur that respondent was unable to fill vacancies in the position of dispatcher from the ranks of telegraphers, but it cannot be that Morris is entitled to seniority as a dispatcher above junior telegraphers who were promoted in his absence and that Raulins was not entitled to seniority as an electrician above junior electrician-helpers who were promoted in his absence, by reason of the mere fact that it chanced to happen that respondent, notwithstanding the man power shortage existing during the war, was able to fill the vacancies in the position of dispatcher from the ranks of its telegraphers while, on two occasions, the defendant in the Raulins case was obliged to go outside the ranks of electrician-helpers to find a properly qualified electrician. We submit that there is no real distinction between the Raulins case and the case at bar.

If, however, the distinction sought to be made by the court below is to prevail, that is, if the true rule is that, under a contract to the effect that promotion shall be made on the basis of seniority, provided the senior applicant demonstrates his ability and qualifications, a returning veteran may claim seniority over those junior to him in a lower classification but promoted therefrom in his absence, but that he shall forfeit his right under such contract if, in an isolated case, an applicant not previously employed in the lower classification received the promotion, either because no one therefrom applied, or because the contract in such instance was disregarded, that rule should be so announced by this court.

In accord with the decision in the Raulins case is the decision of the Circuit Court of Appeals for the Fifth Circuit in *Rose* v. *Texas & New Orleans Railroad Company*, 171 Fed. 2nd 458 (December 17, 1948). It will be noted that the contractual provision, set out in the margin, is in legal effect

substantially identical with the rule and practice here prevailing. The right to promotion, being based not on seniority alone, it was held that the plaintiff was not entitled to the promotion which he sought. The court predicated its decision in part on its own decision in *Harvey* v. *Braniff*, 164 Fed. 2nd 521 (December 4, 1947). That suit was brought by employees who were classified as co-pilots at the time of their induction. Soon after their discharge they were promoted to positions as first pilots. They asked that their base pay be figured as though they had actually been first pilots during their time of service. The contractual provision was again substantially identical with the contract and practice in the instant case. It was of this tenor:

> "Seniority shall govern all pilots in case of promotion and demotion, filling of vacancies, their retention in case of reduction in force, their re-employment after release due to reduction in force, their assignment or reassignment due to expansion or reduction in schedules and their choice of vacancies, provided that the pilot's professional qualifications are sufficient."

In the course of the opinion it was said:

> "In order to be promoted to the position of first pilot under the contract with appellee, their employer, co-pilots had to undergo severe tests and were required to fly a certain number of hours. Unless they could comply with the tests and pass them satisfactorily and comply with the number of hours, seniority did not entitle them to be advanced to the position of first pilot. Seniority merely gave them the right to take the tests.
>
> "Where an employee has no fixed or absolute right to promotion and where his right to promotion depends upon qualifications over and above mere length of service, the employer has fully complied with the terms of the Selective Training and Service Act when he restores the veteran to the same position or one of like seniority and pay which he held at the time of his induc-

tion into the service. In subsequently promoting the employee, the employer is not required to pay him more than the wages or salary attaching to his new rank at the time he assumes it."

The decisions of the Circuit Courts of Appeals which we have cited are supported by the following decisions of District Courts:

Bond v. *Tennessee Coal & Iron R. Company*, 73 F. Supp. 333 (July 9, 1947);

Harrison v. *Seaboard Airline R. Company*, 77 F. Supp. 55 (May 10, 1948).

We respectfully submit that the court was in error in its statement that the respondent's "Military service legally excused him from his failure to bid for the two vacancies filled while he was in service by two men who were junior to him on the telegraphers' seniority roster" and in its conclusion that he must thereby be deemed to have bid for the positions and successfully passed the examination and qualified at the time of the promotion of these men. This holding is in direct conflict with the decisions of the Circuit Courts of Appeals for the Sixth and Fifth Circuits to which we have referred. Manifestly if Morris was, by reason of his military service, legally excused from bidding and is to be deemed to have bid, passed the examination, and qualified at the time of the promotion of Middlekauf and Adkins, Raulins was for the same reason legally excused from bidding for the position of electrician at the time of the promotion of the junior electrician-helpers and must be deemed to have then shown sufficient ability by fair trial. Harvey and his fellow co-pilots were likewise legally excused by their military service from applying for positions as first pilots and must be deemed as having demonstrated that their professional qualifications were sufficient at such time

as there existed a vacancy not filled by a senior co-pilot and they were entitled to have their base pay figured as though they had actually been first pilots from that time. The courts, however, held otherwise.

(c)

It is petitioner's contention that the *Fishgold* case has settled in favor of its position the question presented in the instant case. If this Court should conclude otherwise, the petition should be granted to the end that such question should be settled by this Court. It is a question of federal law and one which by reason of its very nature and the wide prevalence of seniority systems in every field of industry has many times arisen. In view of the conflict between the decision of the Circuit Court of Appeals in the instant case and the decisions of other Circuit Courts of Appeals to which we have referred, veterans, labor organizations, and management cannot conceivably know the rights which they possess and the obligations which rest upon them.

It is, with great respect, submitted that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit should be reviewed and reversed.

ALBERT H. COLE,
Counsel for Petitioner.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 638

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Petitioner,

vs.

GILMER S. MORRIS,

Respondent.

BRIEF IN ANSWER TO PETITIONER'S PETITION AND BRIEF FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE DUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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ANSWER BRIEF TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

"The Proceedings."

The Petitioner's statement as to the proceedings found at Pages Two (2), Three (3) and Four (4) of Petitioner's brief, is correct in substance.

The Facts.

Petitioner's statement under the above heading found at Pages Four (4), Five (5), Six (6), Seven (7), Eight (8) and Nine (9) of Petitioner's brief, is not a statement of all the relevant and necessary facts and said statement is also subject to corrections, which supplemental facts and corrections are as follows, to-wit:

Supplemental Facts.

"A"

Petitioner's statement found at the bottom of Page Five (5) of Petitioner's petition, to the effect that, "Telegraphers who are absent on leave or furlough or sick, receive no such bulletins from the company (20-39-40)" should be supplemented by Rules Fifty-two (52) and Fifty-six (56) of Telegraphers' Agreement, readings as follows:

RULE FIFTY-TWO (52).

Leave of Absence

A Leave of Absence may be granted for a period of sixty (60) days, only one (1) sixty (60) day leave of absence may be granted in any twelve (12) month period. Leave of Absence to exceed sixty (60) days may be granted employees by proper authority upon satisfactory reasons being offered therefor in writing, a copy to be furnished to and approved by the local chairman of seniority territory in which located and the general chairman of the Telegraphers' committee. However, unless otherwise arranged, the absentee will forfeit all rights to his regular position and will go on the extra list with full rights when he returns to duty. (Rule Fifty-Two (52), Telegraphers' Agreement, Plaintiff's Exhibit Two (2), Record Page Eighty (80).)

Also:

RULE FIFTY-SIX (56).

Incapacitated employees

If an employee assigned to a position becomes incapacitated or unable to fill the position, he will be assigned to the extra list with full rights *"and will be entitled to any advertised position to which his seniority and merit give him rights."* (Our emphasis.) (Rule Fifty-Six (56), Telegraphers' Agreement, Plaintiff's Exhibit Two (2), Record Page Eighty-Two (82).)

"B"

In the last paragraph of Petitioner's petition at Page Eight (8) is found the following statement, to-wit:

"While Respondent was yet in the service and stationed at Santa Anna, California, Owen E. Miller, local chairman of the Order of Railroad Telegraphers, *acting as personal friend of respondent and not under any authorization of the company,* mailed Respondent a bulletin or advertisement for the two (2) extra train dispatchers and asked him to submit the bid to the chief dispatcher (14-15-168)." (Our emphasis.) (Petitioner's Petition Page 68.)

There is not to be found in the record at Pages Fourteen (14), Fifteen (15) or One Hundred Sixty-Eight (168), or any other place in the record in this case, from which even an inference could be drawn, that would support the statement of Petitioner as herein above quoted, but to the contrary, from the testimony of Owen E. Miller, found at Page Thirty-Four (34) of the record, is found the following questions and answers.

The Court: I have some questions, Mr. Miller:

Q. As I understand it, in Mr. Morris' case there came a time when he was in the army when there was a dispatcher's vacancy, a vacancy in a dispatcher's position in your territory, so you sent out these bulle-

tins to all of the telegraphers in your territory, including Mr. Morris, who was in the army?

The Witness: I did not personally send them, but I mailed this particular bid. *The company had ruled I had to mail them to the men that were off the territory.* (Our emphasis.)

By the Court: Q. Anyway, he got a bid, along with the other men?

The Witness: That is right.

By the Court: Q. And then he accepted, he wrote in, said he would accept that bid?

The Witness: That is right.

By the Court: Q. Did other people, including Mr. Middlekauf, say they would accept that bid, too?

The Witness: Mr. Middlekauf had already accepted a position before Mr. Morris had had a chance to bid on it.

By the Court: Q. What do you mean by that?

The Witness: He was off and nobody could get hold of him when he was in the Pacific.

By the Court: Q. That was in the Middlekauf case, in other words, when Mr. Middlekauf got the position of dispatcher you did not send Mr. Morris a bid?

The Witness: No, sir.

By the Court: Q. What about the vacancy filled by Mr. Adkins?

The Witness: He was on hand and he bid.

By the Court: Q. Mr. Adkins did?

The Witness: Yes.

By the Court: Q. What about Mr. Morris, when Mr. Adkins was promoted?

The Witness: He was in the Pacific at that time, also.

By the Court Q. So you did not send him a bid then, either?

The Witness: No, sir.

By the Court: Q. But later, you did send him a bid?

The Witness: Yes, sir; *the company ruled I had to send him a bid.* (Our emphasis.)

By the Court: Q. Who filled the vacancy about which you sent him a bid while he was in the army?

The Witness: Mr. Middlekauf and Mr. Adkins accepted.

By the Court: Q. You said you did not send him one on those occasions.

The Witness: No.

By the Court: Q. But when you did send him one, who filled the vacancy when you did send him one, who finally got that job?

The Witness: Well, Mr. Morris was accepted for that, under the bid.

By the Court: Q. The one you finally sent him?

The Witness: Yes, he was accepted. I think there was one other accepted under that same bulletin.

By the Court: Q. Well, as I understand it—I want to get this straight—there were three occasions during the time Mr. Morris was in the army when a dispatcher's job was open in your territory, and those were filled by Middlekauf, Adkins and Knipp, is that right?

The Witness: They were filled, yes, sir.

By the Court: Q. While he was gone?

The Witness: Yes, sir.

By the Court: Q. Did you in any of those cases, when the vacancies came up which were filled by Middlekauf, Adkins and Knipp—send Mr. Morris a bid?

The Witness: I did not.

By the Court: Q. But there did come a time when there was a vacancy while he was still in the army, and you sent him a bid?

The Witness: Yes, sir.

By the Court: Q. Was that held open until he came back and qualified for it, was that the one he eventually filled?

The Witness: Yes, sir. (Record Page Thirty-four (34), Thirty-five (35), Thirty-six (36).)

The question whether Mr. Miller sent the bid referred to, acting as a personal friend of Respondent and not acting under any authorization of the company, or whether Mr. Miller sent the bid referred to as a result of instructions

by the company, is a very important question and quite material in this case, not only as to usage and custom, but as to the construction the Petitioner placed upon the Telegraphers' Agreement and its construction placed upon the Selective Service Act and Petitioner's duties thereunder.

"C"

Reference is made to the paragraph first commenced on Page Nine (9) of Petitioner's petition, in which Petitioner says, "There were three (3) occasions while Respondent was in the service when a dispatcher's job was open in the territory. Respondent was then in the Marshall and Caroline Islands and he was not notified of the vacancies." (16-168.) The positions were filled by Middlekauf, Adkins and Knipp. (Petitioner's Petition Page Nine (9).)

Petitioner is in error in this statement, as the record in this case shows that the vacancies filled, while the Respondent was in the Marshall and Caroline Islands, were filled by Middlekauf on the third (3rd) day of June, 1945 and Adkins on the twenty-fifth (25th) day of September, 1945. (Plaintiff's Exhibit Seven (7), Page One Hundred Thirty-two (132).)

The contention in the case at bar grows out of the vacancies that occurred in 1945 while the Respondent was in the Marshall and Caroline Islands, and which were filled by Middlekauf and Adkins.

Knipp did not bid for those vacancies that occurred while the Respondent was in the Marshall and Caroline Islands, but waived his rights at that time and subsequent to the filling of those vacancies by Middlekauf and Adkins, Knipp bid for a vacancy on the sixteenth (16th) day of May, 1946 and his seniority established as of that date and rightfully following Adkins as shown on Exhibit Eight (8) of Page

One Hundred Thirty-Two (132) of the record and the failure of Knipp to bid and exercise his seniority before that time was of his own volition and his place upon the seniority list rightfully follows that of Adkins and is not an issue in this case. (Testimony of J. S. Surber, Record Page Forty-Eight (48), Plaintiff's Exhibit Eight (8), Record Page One Hundred Thirty-Two (132).)

THE QUESTION PRESENTED.

Reference is hereby made to Petitioner's statement under the heading "THE QUESTION PRESENTED" found at Page Ten (10) of Petitioner's brief.

It is most respectfully submitted that Petitioner presents a question growing out of a limited state of facts found in Petitioner's petition at Pages Four (4) to Nine (9) inclusive and the errors in the statement of facts, as pointed out in this brief under the heading, "THE FACTS", all of which fails to present the real question in this case.

The Respondent most respectfully submits that the District Court and the Circuit Court of Appeals did not decide this case upon the limited facts and error in facts, as stated by Petitioner in its petition, but decided the case at bar, taking into consideration the additional facts set out in this brief, preceding this chapter, and the proper correction of the errors made by Petitioner, as pointed out in the preceding chapter of this brief.

The real question in this case and the question that should be presented to this Honorable Court is as follows:

Is a returning Veteran, who had left the employment of his employer to enter the armed forces, entitled, under the circumstances hereinafter set out, to the seniority

standing in his employment that he would have been entitled to, had he remained at home, and which circumstances are as follows, to-wit:

ONE.

Respondent was employed by Petitioner on January 12, 1940 as a telegrapher in Peru, Indiana. He continued to occupy said position until July 26, 1944, at which time he entered the services of his country in the United States Navy.

TWO.

Respondent remained in the military service until May 17, 1946 on which date he received a certificate evidencing satisfactory completion of his military duties.

THREE.

During his employment as a telegrapher, the Respondent was a member of Agents, Telegraphers, Telephone Operators and Levermen's Union Number Eight (8). The general regulations of said union and the agreement existing when Respondent entered the service and for many years prior thereto and now provides as follows:

RULE TWENTY (20) (A) WHEN ADDITIONAL EXTRA TRAIN DISPATCHERS ARE NEEDED, THE POSITIONS WILL BE ADVERTISED TO ALL EMPLOYEES ON THE PRESENT TELEGRAPHERS' SENIORITY TERRITORY.

FOUR.

During all the time in question, the Respondent had and has a seniority listing as a telegrapher as of June 12, 1940. Certain of Petitioner's employees in the Peru Territory have had and have the following seniority listing as telegraphers during said time: H. E. Middlekauf, Au-

gust 17, 1942; J. L. Adkins, November 10, 1942; and W. A. Knipp, December 13, 1916.

FIVE.

In filling vacancies and positions of train dispatchers in the employment of the Petitioner, it was customary and in accord with the union agreement, to advertise to all employees on the present telegraphers seniority territory, as provided by Rule Twenty (20) (A) heretofore quoted. In other words, the vacancy was always offered first to the telegraphers in the territory involved who had the highest seniority. If he did not bid in the position or if he failed to pass the examination which was required or to qualify, the telegrapher who had the next highest seniority was given the same opportunity. This was continued until the position was filled.

SIX.

During the time that the Respondent was in military service, four (4) vacancies in the train dispatcher's position occurred in the Peru Territory. No bulletins of the first three (3) vacancies were sent to the Respondent and he was not given the opportunity to bid in or qualify for said positions, for the reason that Respondent was then in the Marshall and Caroline Islands in the South Pacific and they "could not get hold of him". The positions were filled by the said H. E. Middlekauf, J. L. Adkins and W. A. Knipp. Their seniority as dispatchers is dated respectively June 3, 1945; August 25, 1945; May 16, 1946. W. A. Knipp, who had superior seniority, did not bid for the vacancies filled by Middlekauf and Adkins but waived his rights to said positions.

SEVEN.

The local chairman of the Order of Railroad Telegraphers sent a bulletin regarding the fourth (4th) vacancy to Respondent, pursuant to instructions by the Petitioner, while Respondent was yet in the military service at Santa Anna, California and Respondent thereafter mailed in his bid for said position and said position was held open for Respondent, pending his discharge from Naval Service.

EIGHT.

On July 24, 1946, Respondent took an examination for train dispatcher and thereafter received a certificate from the Petitioner stating that he was promoted August 3, 1946, to the position of Train Dispatcher.

NINE.

Since the 3rd day of August, 1946, Respondent has been a member of Train Dispatchers' Union Number Four (4). This Union has jurisdiction over the Peru territory of the Petitioner. The general regulation of said Union agreement with the Petitioner provides in part as follows:

RULE FIVE (5) (A) "Seniority as dispatcher will date from date employee passes the required examination and qualifies as dispatcher. If more than one employee on one dispatcher territory is examined and qualifies as dispatcher on the same day, their seniority dates as dispatcher will be in the order of seniority they held on the telegrapher roster. Each employee examined as dispatcher when qualified, will be given a certificate of qualification following seniority stand."

RULE FIVE (5) (B) "In filling vacancies in positions as dispatchers, seniority shall be observed and the senior

applicant will be given the position if he has the necessary ability."

These regulations have been effective since October 1, 1944; however, the above quoted rules have been in force within the Peru territory since 1926. The Respondent was not a member of the Train Dispatchers' Union until after his promotion and previous to said promotion was a member of the Telegraphers' Organization.

TEN.

The District Court's conclusion of Law Number Two (2) was as follows:

"The Petitioner (respondent) is entitled to have his name placed on the Respondent's (petitioner) seniority list of Train Dispatchers in the Peru territory as of June 3, 1945 and ahead of H. E. Middlekauf and judgment rendered in conformity with conclusion of Law Number Two (2)."

ELEVEN.

The Circuit Court of Appeals for the Seventh Circuit affirmed the judgment of the lower Court.

REASONS RELIED ON FOR DISALLOWANCE OF THE WRIT.

Petitioner relies, for disallowance of the writ, upon these reasons:

A.

(1) The Circuit Court of Appeals in deciding the question presented, as hereinabove stated in this brief, decided the question in a manner which is not in conflict with applicable decisions of the Supreme Court and that the judgment of both the District Court and the Circuit Court of Appeals is in complete harmony with the decision of this Honorable Court in the case of *Fishgold* v. *Sullivan Dry Dock and Repair Corporation*, 328 U. S. 275 in this:

(2) The judgment of the District Court and the Circuit Court of Appeals in effect holds, that under the facts herein appearing, and set out in this brief, the Selective Training and Service Act of 1940, 54 Stat. 85 C 720, 50 U. S. C. Appx. Section 301, grants to a returning veteran, not merely his similar position with like seniority status and pay, that he enjoyed at the time of his departure, but that, the veteran was not to be penalized on his return by reason of his absence from his civilian job. He was, moreover, to gain by his service for his country an advantage which the law withheld from those who stayed behind. Thus, the veteran does not step back on the seniority escalator at the point he stepped off, he steps back on the precise point he would have occupied if he had kept his position continuously through the war and that the veteran acquires not only the same seniority he had, his service in the armed forces is counted as service in the plant so that he does not lose ground by reason of his absence and the judgment of both the District Court and

the Circuit Court of Appeals did not constitute a step up or gain in priority for the Respondent and is in complete harmony with the decision of this Honorable Court in the *Fishgold* case.

(3) Such decision is to the effect, under the facts appearing in this brief, that the Respondent shall be given seniority as a dispatcher as of June 3, 1945, notwithstanding the fact that he did not pass the examination and qualify for that position until August 3, 1946, and this in conformity with a valid Collective Bargaining Agreement of the Telegraphers' organization, providing in substance that, "When additional extra train dispatchers are needed, the positions will be advertised to all employees on the present telegraphers' seniority territory" (17, 70, 167) and in addition thereto, recognition of the validity of that agreement by the Petitioner and the further fact that the Petitioner for some thirty (30) years, had never deviated from that contract in the selection of train dispatchers. The decision of the Circuit Court of Appeals is in complete harmony with the principles enunciated in the *Fishgold* case. (Testimony J. S. Surber, Record Page Forty-six (46) to Seventy-four (74).)

ARGUMENT.

("A.")

Point One (1) Petitioner's Brief Pages 14-15-16-17:

Petitioner's Argument under Subdivision "A", at Pages Fourteen (14) to Nineteen (19) inclusive, is addressed to what the Petitioner claims is a conflict between the decision of the Circuit Court of Appeals in the case at bar and the case of *Fishgold* v. *Sullivan Corporation*, 328 U. S. 75; 90 Law Edition 1230.

In Petitioner's Argument, the Respondent most respectfully submits that throughout the argument referred to, the Petitioner has failed to follow the construction that this Honorable Court has placed upon Section Eight (8) of the Selective Service Act, wherein this Court said:

"This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need", and instead of giving the Act a liberal construction, throughout Petitioner's petition and brief, Petitioner adopts a most strained construction upon the Act in question.

In Petitioner's argument found at Page Fifteen (15) of Petitioner's brief, the position is taken by Petitioner that, "Section Eight (8) (B) provides that he should be restored to the position which he left or to a position of like seniority status and pay," and says, "he was a telegrapher when he entered the service and upon his return he was restored to the identical position which he left and with all the seniority that he held when he went into the service.", and following that statement, Petitioner refers to Section Eight (8) (C) and says that that Section does not entitle the Respondent to the seniority

which he claims and after quoting Section Eight (8) (C) proceeds to take the same position, that under Section Eight (8) (C) all the veteran is entitled to is the identical position which he left and with all the seniority which he held when he went into military service and in restoring the veteran to the old job with the seniority he held when he went into the service, is "a full compliance with all applicable provisions of Section Eight (8) (C)."

Petitioner's construction of the Act in question and its interpretation of the holding in the *Fishgold* case, is certainly in conflict with the act and in conflict with the construction this Honorable Court has placed upon the Selective Training and Service Act, in the *Fishgold* case and under the Selective Training and Service Act, the veteran is entitled to more than the same job he held when he entered the service, he is entitled to not only the seniority he held at the time he entered the service but upon his return he is entitled to exercise the seniority that has accumulated, during the period of time that he was serving his country. This Honorable Court has affirmed that proposition in no uncertain words by the use of the following language in the *Fishgold* case:

> "He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job. He was, moreover, to gain by his service for his country, an advantage which the law withheld from those who stayed behind. • • • *Thus he, (the veteran) does not step back on the seniority escalator at the point he stepped off. He steps back on the precise point he would have occupied had he kept his position continuously during the war.*" (Our Emphasis.)
>
> "*As we have said, these provisions guarantee the veteran against loss of position or loss of seniority by reason of his absence. He acquires not only the seniority he had, his service in the armed service is counted as service in the plant so that he does not*

lose ground by reason of his absence." (Our Emphasis.)

"*Congress protected the veteran against loss of ground or demotion upon his return.*" (Our Emphasis.)

In the same paragraph of argument under Point One (1) at Page Sixteen (16) of Petitioner's Brief, the Petitioner on the one hand says, "While the Act is to be construed in favor of returning veterans, such construction does not contemplate that one who has been accorded every act which the act, by its terms confers, shall, upon his subsequent promotion to a higher position be given a step up or gain in seniority over those who were promoted to a higher position during his absence, etc."

And then says, "Such in effect, is the holding of this Court in the *Fishgold* case, where it said:

> "As we have said, these provisions guarantee the veteran against loss of position or loss of seniority by reason of his absence. He acquires not only the seniority he had; his service in the armed services is counted as service in the plant, so that he does not lose ground by reason of his absence but we would distort the language of these provisions as we read it as granting the veteran an increase in seniority over what he would have had if he had never entered the armed services." * * * "No step up or gain in priority can be fairly implied."

It is, of course, necessary to read the opinion in the *Fishgold* case in its entirety, and this including the facts upon which the Petitioner (veteran) based his complaint and then apply the words of this Honorable Court as above quoted as applicable to the situation of the veteran in the *Fishgold* case.

The facts in the *Fishgold* case were as follows:

> "On each of nine (9) days in the spring of 1945, Petitioner was laid off although other welders, not

veterans of the recent war, showing the same or similar skill of Petitioner, were given work on those days. *These men were preferred because they had a higher shop seniority than petitioner.* (Our emphasis.) The decision to lay off Petitioner following a decision of an arbitrator who ruled that the seniority provision of the Collective Bargaining Agreement * * * required it and that they are not inconsistent with the provision of the Selective Training and Service Act of 1940."

There can be no doubt, from a study of the opinion of this Honorable Court, in the *Fishgold* case, that if the veteran in that case had held a higher shop seniority than the welders who were retained, the District Court would have been right in its judgment and that judgment would have been affirmed by the Circuit Court of Appeals, and that decision affirmed by this Honorable Court.

Division (A).

PETITIONER'S BRIEF POINT TWO (2).
Pages 17-18-19.

It is true that respondent relies upon the contract between the petitioner and the order of railway telegraphers, the provision of which is of the following tenor: (Our emphasis.)

> "When additional train dispatchers are needed, the positions will be advertised to all employees on the present telegraphers seniority territory."

The above quoted portion of the contract with the Order of Railway Telegraphers has to do with seniority and the protection of that seniority, and confers upon the telegrapher a right to exercise that seniority in promotion from telegrapher to dispatcher and that certainly is not a meaningless rule incorporated in the Telegraphers' Agreement.

Irrespective of what construction or interpretation is placed upon that part of the Telegraphers' Agreement by counsel, the meaning and value of that portion of the Telegraphers' Agreement is illustrated by the construction and interpretation placed upon that agreement by the only witness in the District Court, produced by the Petitioner, Mr. J. S. Surber, Chief Train Dispatcher of the Chicago Division of the Chesapeake and Ohio Railway Company, and prior to which, he was Supervisor of Employees and prior to that a Train Dispatcher. (Record Page 38.)

Respondent feels that it is in the interest of time that that portion of the evidence of Mr. Surber, placing an interpretation upon the Telegraphers' Agreement, be set out here in question and answer form, as follows:

Q. These men who are named on Defendant's Exhibit 1, how is it they were given the opportunity to attempt to qualify for dispatcher?

A. Because of their senior seniority, and having asked for that opportunity at the time the bulletin was issued.

Q. Well, it was by virtue of their senior seniority, wasn't it?

A. That is right.

Q. And their bids in answer to the advertising that your office made for these bids, is that right?

A. That is right.

Q. And that was all done under a contract between the labor organization and the C. & O. Railway, wasn't it?

A. Between the Order of Railroad Telegraphers and the C. & O.

Q. And then it was pursuant to that contract that you advertised these vacancies as dispatchers, isn't that true?

A. Yes, sir.

Q. And it was by virtue of that contract that you gave the senior telegraphers on that roster the opportunity of qualifying for train dispatcher, is that right?

A. Yes, sir.

Q. How long has that contract been in effect?

A. It has been a number of years; I can't say offhand.

Q. You don't know. Hasn't it been in effect for some thirty years, or so?

A. It has been quite a number of years.

Q. Almost that length of time?

A. I would think so.

Q. Have you any records in your office, or any records of the C. & O. Railway Company, that show you ever deviated from that contract in the selection of train dispatchers?

A. Not to my knowledge.

Q. Not to your knowledge.

In other words, during all that time that you can recall, they have always advertised for bids for the office or position of train dispatcher, and furnished the telegraphers with bids or notice of that vacancy, to give them an opportunity to qualify for that position, is that right?

A. There should be a qualification to the question, I believe.

The Court: You can answer it qualifiedly.

A. The bulletins have been offered to the members of the seniority roster. There has been an exception: Recently it was offered for the second time; we did not get any bids for it.

Q. But it is a matter of fact, Mr. Surber, during all of this period of time that you remember, all of these positions to the office of train dispatcher were advertised pursuant to a contract between the telegraphers' organization and the C. & O. Railway Company that is in effect at the present time and has been in effect all that time, is that right?

A. That is right.

Q. And that called for the senior telegrapher to have that opportunity, is that right?

A. Yes, sir. (Record Pages 46-47.)

In the face of the above Rule, quoted in Petitioner's brief,

and as above set out in this brief, together with the interpretation placed upon that agreement by Mr. Surber, Petitioner, under Sub-division Two (2) of Division "A" of its brief, sets out Rule Five (5) (A) of the Dispatchers' Agreement, quoted as follows:

> "Seniority as dispatcher will date from date employee passes the required examination and qualifies as dispatcher. Where more than one employee on a dispatcher territory is examined and qualifies as dispatcher on the same day, their seniority dates as dispatchers, will be in the order of seniority they held on the telegraphers' roster."

And then Petitioner says:

> "Under no circumstances, is seniority as a dispatcher established by the Telegraphers' Agreement. The Dispatchers' Agreement, under which alone, seniority as a dispatcher can be acquired, recognizes Telegraphers' seniority only in the single instance where one qualifies for dispatcher on the same day."

Rule Five (5) (B) provides that:

> "In filling vacancies in positions as dispatchers, seniority shall be observed and the senior applicant will be given the position if he has the necessary ability."

And then Petitioner says:

> "This provision has no reference to promotion from position of telegrapher to that of dispatcher and the seniority thereby acquired. The matter is covered exclusively by Rule Five (5) (A). Rule Five (5) (B) relates exclusively to the filling of particular positions as dispatchers by those who have already become dispatchers, etc."

Petitioner then says, on Page Eighteen (18):

> "The contract in question (Dispatchers' Agreement) is not in conflict with Selective Training and Service Act and it was not the intention of Congress to sweep aside such a seniority system as it created. Indeed, the intention of Congress was quite to the contrary."

As was said by the Court in the *Fishgold* case, 328 U. S. 275, 288 (May 27, 1946):

"Congress recognized in the Act, the existence of seniority systems and seniority rights." It sought to preserve the veterans' rights under those systems and to protect them against loss under them by reason of his absence. It is indeed no suggestion that Congress sought to sweep aside the seniority system. What it undertook to do was *"to give the veteran protection within the framework of the seniority system plus a guarantee against demotion or termination of the employees' relations with the company for a year."* (Our emphasis.)

If, the Dispatchers' Agreement, and that portion of it as quoted by Petitioner, can be construed as preventing the Respondent in this case from exercising his seniority rights, conferred upon him as a telegrapher, under the Telegraphers' Agreement, then most assuredly, that portion of the Dispatchers' Agreement, quoted by Petitioner, is in conflict with the Selective Training and Service Act of 1940, when we take into consideration the Telegraphers' Agreement and the interpretation placed upon that agreement by Mr. J. S. Surber in his evidence as above set out in this brief.

This Honorable Court, in its opinion in the *Fishgold* case said:

> "And no practice of employer or agreement between employer and union can cut down the service adjustment benefit which Congress has secured the veteran under the Act."

On the one hand, Petitioner takes the position that the sole and only contract having to do with the seniority rights of dispatchers, grows out of the Dispatchers' Agreement, but says, at the bottom of Page Eighteen (18) of its brief:

"At the time of his induction, the Respondent's rights were governed solely by, and his seniority existed solely under, the framework of the telegraphers' contract.", thereby admitting that Respondent's rights to promotion to dispatcher grew out of the telegraphers' contract.

It is most difficult to restrain ourselves from saying that we have reached a point where consistency ceases to be a virtue and if the position of Petitioner would be well taken, the result is obvious, it would simply amount to a nullification of the very Act of Congress that was intended to protect the veteran.

At Page Nineteen (19) of Petitioner's brief, Petitioner says in substance, that if Respondent's position is sustained, "it would open the door for the Courts to sweep aside the seniority system." And then Petitioner cites the case of Knipp, as an example of a chaotic condition which would result.

The Respondent respectfully submits that the Knipp situation does not present a chaotic condition in any sense of the word. Knipp rightfully belongs on the dispatchers' seniority roster as following Adkins and his position on the seniority roster, is the result of his own doings. The undisputed evidence in this case is to the effect that Knipp, although senior on the telegraphers' roster, had bid on an extra dispatcher's position about 1926 and worked as a dispatcher for a number of years. He resigned at his own request, but at a later date, on a later bulletin, he bid it in again and was qualified as a train dispatcher. (Testimony J. S. Surber, Record Page 48.)

At the time of the advertisement for bids for dispatcher in June, 1945, while Respondent was in the Marshall and Caroline Islands, Middlekauf bid for an advertised vacancy at that time and was promoted and in September, 1945, Adkins bid for a position as dispatcher, pursuant to advertisement, while Morris was in the Marshall and Caroline

Islands and was promoted from telegrapher to dispatcher; Knipp did not put in a bid for those vacancies, but waived his right to those vacancies, and he waived his right to those vacancies while Morris was in the Marshall and Caroline Islands. (Plaintiff's Exhibit Seven (7), Record Page 132.)

There is nothing strange about Knipp's position on the Dispatchers' roster, irrespective of his seniority as a telegrapher and he does follow Adkins on the dispatchers' roster, and rightfully so, because he failed to exercise his rights when he had the opportunity. In other words, at the time Morris was in the Marshall and Caroline Islands, Morris was prevented from exercising his rights by virtue of his service to his country and at the same time, Knipp's rights were not exercised under his seniority as a telegrapher, simply because it was his own independent desire to waive his rights and not exercise them.

Petitioner then cites the case of *Trailmobile, et al.* v. *Whirls*, 331 U. S. 40, and says that, "This Court has not receded from the position taken in the *Fishgold* case but, on the contrary, has adhered to the principles therein announced."

The Respondent fully agrees with that statement of Petitioner.

In the *Trailmobile* case, this Court said, in referring to the *Fishgold* case, that, "The returning veteran, it was held, could not be disadvantaged by his service to the nation, he was not to be penalized on his return by reason of his absence from his civilian job. He was to be restored and kept for a year, at least, in the same situation as if he had not gone to war, but had remained continuously employed or had been on furlough or leave of absence." And then said, "But the Fishgold decision also ruled expressly that he was not to gain advantage beyond such restoration, by virtue of the Act's provision, so as to acquire, *an increase in seniority over what he would have had, had he never*

*entered the armed service * * * no step up or gain in priority can be fairly implied.*" (Our emphasis.)

Suffice it to say, that the record in the case at bar, shows that by virtue of the judgment of the District Court, as affirmed by the Circuit Court of Appeals, the Respondent has not suffered an "advantage by his service to the Nation." He has been restored to the same situation and position as if he had not gone to war, but had remained continuously on the job or had been on furlough or leave of absence, and he has not acquired, by virtue of the judgment of the District Court, as affirmed by the Circuit Court of Appeals in this case, an increase in seniority over what he would have had if he had never entered the armed services * * * no step up or gain in priority has been received or accepted by the Respondent in this case.

Division (B).

Petitioner's Brief, Pages 20 to 26.

The decision of the Court below in the instant case is not in conflict with the decision of every other Circuit Court of Appeals on the same matter, but to the contrary, each case cited by Petitioner is to be distinguished from the case at bar, as hereinafter pointed out in this brief:

Rawlins v. *Memphis Union Station Company,* 168 Fed. 2nd 266 (June 1, 1948), Petitioner's Brief, Pages 20, 21, 22, 23:

The *Rawlins* case is to be distinguished from the case at bar in each of the following particulars, to-wit:

1. The District Court in the *Rawlins* case, held that under the Collective Bargaining Agreement, the electricians had seniority rights among themselves; that the electrician-helpers had seniority rights among themselves; that the seniority system was wholly separate from that applicable

to electrician-helpers, and that the appellants at the time when they left their position as electrician-helpers had no fixed right to promotion from the position of electrician-helper to the position of electrician, *by virtue of any custom or by virtue of any contract written or otherwise.* (Our emphasis.) *Rawlins* v. *Memphis Union Station Company,* 168 Fed. 2d, Special Page 469.

In the case at bar, the Circuit Court of Appeals, in referring to the facts in this case, said: "The Court (District Court) found as a fact that in filling vacancies in positions of train dispatchers with defendant it was customary and pursuant to an agreement with the Agents, Telegraphers, Telephone Operators and Leverman Union No. 8 of which Plaintiff was a member during his employment as a telegrapher, to advertise to all employees on the present telegraphers' seniority territory. Any vacancy was always offered first to telegrapher in the territory involved who had the highest seniority." (Opinion Circuit Court of Appeals, Record Page 187.)

Another distinction pointed out by the Circuit Court of Appeals, in the case at bar, is most ably presented, and in very clear cut and understandable manner, as follows:

> "We hereby adopt the opinion of Judge Swygert as the opinion of this court. We feel compelled, however, to discuss *Rawlins* v. *Memphis Union Station Co.,* 168 F. 2d 466, which was decided subsequent to the time this case was decided by the District Court, and which defendant's counsel told us in oral argument was his strongest case.
>
> In that case the relevant facts were that two veterans were returned to their positions as electrician-helpers. Subsequently they were promoted to the positions of electricians, but their seniority status as electricians was junior to that of two non-veterans who had been junior to the veterans on the electrician-helpers' seniority roster and who were promoted to

the positions of electricians while the appellants were in service. When the veterans later were demoted to the positions of electrician-helpers on the basis of seniority while the non-veterans were retained as electricians, they brought their actions under the Act to be restored to the better positions. It appeared that a collective bargaining agreement between the union and the company was in existence which provided in part that preference in filling vacancies was to be given to the employees with the most seniority who showed sufficient ability after a fair trial. The court held that the terms of this union agreement did not make promotion from electrician-helper to electrician an automatic one, and that it was not the custom that the electricians must come from the ranks of the electrician-helpers, because the evidence showed that two men who were not electrician-helpers were employed during the war as electricians.

In our case the factual situation is materially different. Both the terms of the union agreement and the custom decreed that the dispatchers be taken after qualification according to their seniority from the telegraphers' roster. To hold in this case that Morris should have qualified as a dispatcher before he did, would circumvent the spirit and purpose of the Act and the words of the Supreme Court." (Opinion Circuit Court of Appeals, Record Page 188.)

There is another very clear distinction between the *Rawlins* case and the case at bar, in the following particular:

In the *Rawlins* case the Court said: "If the Appellants had been on furlough or leave of absence, instead of in the service, when the vacancies occurred, they would not have obtained the promotions which they are now claiming. Section Eight (8) of the Act provides that the employee shall be considered as having been on furlough or leave of absence during his period of training. Rule Thirteen (13) of the Collective Bargaining Agreement, dealing with leave of absence, provided for such a leave for a period not

exceeding thirty (30) days with privilege of renewal, *but made no provision that an employee who had been absent upon leave, may upon returning, exercise those rights that would have been available to him if he had not been absent.*" (Our emphasis.)

Rawlins v. *Memphis et al.*, 168 Fed. 2d Special Page 469.

There exists an entirely different situation and state of facts in the case at bar.

The evidence in the case at bar shows how jealously the seniority of telegraphers was guarded and protected by the Telegraphers' Agreement:

The Telegraphers' Agreement:

Rule 20(a) "When additional extra train dispatchers are needed, the position will be advertised to all employees on the present telegraphers' seniority territory." (Appellee's Exhibit Two (2), Record Page 70.)

> "Rule 52—Leave of Absence. A leave of absence may be granted for a period of sixty days. Only one sixty-day leave of absence may be granted in any 12 months period. A leave of absence to exceed sixty days may be granted employees by proper authority upon satisfactory reasons being offered therefor in writing, a copy to be furnished to and approved by the Local Chairman of the seniority territory on which located, and the General Chairman of the Telegraphers' Committee. *However, unless otherwise arranged, the absentee will forfeit all rights to his regular position and will go on the extra list with full rights when he returns to duty".* (Our emphasis.) (Rule 52—Telegraphers' Agreement, Plaintiff's Exhibit Two (2), Record Page 80.)

Rule 56—Incapacitated Employes. "If an employee assigned to a position becomes incapacitated, *or unable to fill the position, he will be assigned to the extra list with*

full rights and will be entitled to any advertised position to which his seniority and merit give him right.'' (Rule 56, Telegraphers' Agreement, Appellee's Exhibit Two (2), Record Page 82.)

The Telegraphers' Agreement, together with the evidence of Mr. Surber, as to Petitioner's own interpretation of Rule 20(a), and custom the fact that Rule 20(a) had not been deviated from in almost thirty (30) years, clearly points out the distinction between the *Rawlins* case and the case at bar, as distinguished from a conflict of authorities. (Testimony of J. S. Surber, Record Pages 34-35-36, Pages 18-19 this Brief.)

> *Rose* v. *Texas & New Orleans Railroad Co.*, 171 Fed. 2d 458 (Dec. 17, 1948), Petitioner's Brief Pages 23-24-25.

In the *Rose* case, Rule 3 of the bargaining agreement provided for the management to be the judge of ability, merit and fitness, on an absolute and not on a comparative basis, before promotion.

In the *Rose* case, there was no contention over the interpretation of the bargaining agreement and it was construed by the District Court just as the veteran contended it should be.

The Court found that the employer, ''in exercising its rights under Rule Three (3), the defendant (employer) had acted in good faith and not capriciously or arbitrarily; and that plaintiff (veteran) had not shown, contrary to defendant's determination, that he was entitled to promotion.

There is no such issue in the case at bar, and the *Rose* case was not decided on any facts that are even similar to the facts in the case at bar.

It is Respondent's position that the *Rose* case shows a very pronounced distinction and not a conflict.

Harvey et al. v. *Braniff International Airways Inc.*, 164 Fed. 2d 521 (Dec. 4, 1947), Petitioner's Brief Pages 24-25.

Just a fleeting glance at the case of *Harvey* v. *Braniff*, shows the pronounced distinction between that case and the case at bar and Respondent most respectfully submits that the following quotation, from the opinion in the *Harvey* case, is sufficient to show that distinction:

> "Appellants admit that with respect to seniority, they have been restored to which they are entitled, but they claim that the credits due for the time spent in the armed forces entitles them to pay as first pilots under the contract in force between the trade union and the appellee at the time they were inducted into the service. The question then is narrowed to this: Since appellants are now first pilots, enjoying all the seniority rights to which they would have been entitled had they not joined the armed forces, have they also the right to base pay figured as though they had actually been first pilots during their time of service." (*Harvey* v. *Braniff*, 164 Fed. 2d, Special Page 521.)

Bond v. *Tenn. Coal & Iron Co.*, 73 Fed. Supp. 333 (July 9, 1947). (Petitioner's Brief Pages 25-26):

The *Bond* case is to be clearly distinguished from the case at bar:

In the *Bond* case, the Court found, that prior to June 13, 1942, the date the veteran entered the service, "there was no written agreement, nor any established customs and practices among the salaried employees of the respondent * * * there had not been established any definite line of promotion among the salaried employees * * * the matter of promotion * * * was not controlled by length of service, solely, but was also governed by relative ability

and physical fitness to perform the work incident to the higher position * * * prior to June 13, 1943, as well as at all times subsequent to said date, it had been the established custom of respondent not to consider any of its salaried employees for promotion, while they were on leave of absence."

"Subsequent to June 4, 1943 (subsequent to the veteran's induction) by written collective bargaining agreements * * * it was provided among other things as follows:

"SECTION SIX (6)—SENIORITY"

"It is understood and agreed that in all cases of promotion (except promotions not covered by this agreement) an increase or decrease in forces, the following factors shall be considered as listed below; *however only where both factors "A" and "B" are relative by equal shall continuous service be the determining factor:*" (Our emphasis.)

"A. Ability to perform work;

"B. Physical Fitness;

"C. Continuous Service." (*Bond* case Special Page 334.)

Conclusion of Law.

"Inasmuch as petitioner (veteran) at the time when he left the employment of respondent for the purpose of entering the armed forces, had no fixed, or absolute right to promotion to the position of Payroll Clerk, upon the occurrence of a vacancy in such position and, inasmuch as his right to promotion to such position did not depend solely on the length of his continuous service in the position of Assistant Payroll Clerk, *together with the fact that, it was the established practice of respondent not to consider any of its salaried employees for promotion; while they were on leave of absence,* the Court finds that the Petitioner

was not entitled, upon being reemployed by respondent, following his discharge from military service, to be employed in the position of Payroll Clerk, Wylan Division." (Our emphasis.) (*Bond* Case Special Page 335.)

The distinction between the *Bond* case and the case at bar is clearly apparent when the facts in the case at bar are taken into consideration and to avoid repetition, Respondent respectfully refers to preceding divisions "A" and "B" of Respondent's argument in this brief at Pages 17 to 35, inclusive.

A most vivid illustration of cases that are to be distinguished from a given case and cases that are in conflict with a given case, is found in the cases of *Bond* v. *Tennessee Coal, Iron and R. Co.*, 73 Fed. Supp. 333 (July 9th, 1947), cited by Petitioner, and discussed immediately above in this brief, and the case of *Armstrong* v. *Tennessee Coal, Iron and R. Co.*, 73 Fed. Supp. 329 (July 9, 1947).

The Honorable Judge Lynne, District Court of Alabama, presided in the *Bond* case and wrote the opinion in that case, on July 9th, 1947, and Judge Lynne presided in the *Armstrong* case and on the same day, July 9th, 1947, wrote the opinion in the *Armstrong* case.

In the *Armstrong* case, there was an agreement entered into between the company and the bargaining representative of the employees propounded to clarify the prevailing rules governing seniority to be observed in permanent vacancies in the line of promotion and to accord to the factor of continuous service added significantly to the right to promotion. This agreement, in pertinent part, reads as follows:

FOUR—FILLING PERMANENT VACANCIES.

When a permanent vacancy occurs in any occupation governed by the 1944 agreements, the employee with the great-

est length of continuous service on the occupation immediately preceding the vacant occupation in the divisional line of promotion for the work involved *shall be offered the promotion to the vacancy, provided his ability to perform the work and his physical fitness are relatively equal to that of the other employees in the same line of promotion.* (Our emphasis.)

"Should such employee be unable to fill the vacancy, because of illness or other cause, through no fault of his own, the next qualified employee in line shall temporarily be assigned to the vacancy, pending the return to work of the first mentioned employee. In the calculation of the continuous service in the occupation within the division in such a case, the first mentioned employee shall be given credit for the time the latter employee worked on the occupation and the latter employee shall receive no credit therefor, the same being considered as time worked in an emergency."

The state of facts in the *Armstrong* case are almost parallel with the facts in the case at bar, when we can take into consideration in the case at bar:

First: The Telegraphers' Agreement:

Rule 20 (a) "When additional extra train dispatchers are needed, the position will be advertised to all employees on the present telegraphers' seniority territory." (Appellee's Exhibit Two (2), Record Page 70.)

Second: Agreement relative to Leave of Absence:

Rule 52—Leave of Absence: "A leave may be granted, etc. * * * However, unless otherwise arranged, the absentee will forfeit all rights to his regular position and will go on the extra list *with full rights when he returns to duty.*" (Our emphasis.) (Rule 52—Telegraphers' Agreement, Appellee's Exhibit Two (2), Record Page 80.)

THIRD: Incapacitated Employees:

Rule 56—Incapacitated Employees: "If an employee assigned to a position becomes incapacitated, *or unable to fill the position, he will be assigned to the extra list with full rights and will be entitled to any advertised position* to which his seniority and merit give him right." (Our emphasis.) (Rule 56, Telegraphers' Agreement, Appellee's Exhibit Two (2), Record Page 82.)

FOURTH: The Evidence of J. S. Surber to the effect:

That the advertising for bids was all done under the Telegraphers' contract, Rule 52 and that it was pursuant to that contract that vacancies were advertised for dispatcher; that that contract had been in existence for almost thirty (30) years; and that there are no records of the company that show they have ever deviated from that contract in the selection of train dispatcher and that that contract provided for the senior telegrapher to have the opportunity to bid for dispatcher position. (Record Pages 45-46-47, This Brief Page 32.)

In the *Armstrong* case, the Court's conclusions of law based upon the facts in that case are as follows:

2. The term "restore such person to such position" as used in the Act, 50 U. S. C. A. Appendix, Section 308 (b) (B), means a reinstatement of such person to the same relative place, rank or standing in the employment of his employer as he would have had if he had not been required to leave his employment for World War II training and service in compliance with the Act. The Act does more than restore the World War II veteran to the *status quo ante*. It gives him full benefit of whatever added rights would have accrued to him under his contract of employment or under any contract or statute which inured to his benefit as such an employee if he had remained in his position instead of being inducted into the service. If the

seniority accumulated during the time he was in the service entitled him, as a matter of contract, to a better job classification than he had at the time he left to enter the service, it is the duty of the employer, to give him this better classification.

3. The Selective Training and Service Act of 1940, as amended, required that the honorably discharged veteran shall be given a better position than that which he occupied prior to his induction if his contractual seniority rights entitle him to such better position.

4. The returning veteran is entitled to the benefits of any contracts that were made in his absence but such parts of any contract entered into during his absence that discriminate against veterans are void. (*Armstrong* v. *Tennessee Coal, Iron & R. Co.*, Special Page 332.)

It certainly could not be said that the opinion of Judge Lynne in the *Armstrong* case is in conflict with the opinion of the same Court and the same Judge in the *Bond* case; these cases are to be distinguished in contra-distinction to being in conflict and the same principle applies to the case at bar as the cases referred to and relied upon by Petitioner as being in conflict and in support of Petitioner's request for a Writ of Certiorari. (*Harrison* v. *Seaboard Airline R. Co.*, 77 Fed. Supp. 511 (May 10, 1948).)

The above entitled case is the last case cited by Petitioner to sustain its position, to the effect that the decision in the case at bar is in conflict with the *Harrison* case and other cases cited and relied upon by Petitioner in this brief.

The Respondent most respectfully submits that but a moment spent in an analysis of the *Harrison* case, conclusively shows that the *Harrison* case is to be distinguished from the case at bar and the following, taken from Special Page 514, most assuredly calls the attention of anyone to the fact that there is a vast distinction between the case at

bar and the *Harrison* case and certainly not in conflict and the portion of the *Harrison* case referred to read as follows, to-wit:

> "It is clear that plaintiff could exercise seniority only in accordance with that contract so long as it did not conflict with the Selective Training and Service Act and no conflict exists between the two. The Act does not define how seniority shall be exercised; it leaves that to the labor contract negotiated between the employer and the employees' bargaining agency. In this instance the contract provided that seniority shall be effective when a vacancy occurs, when an additional position is created, when a position is abolished, or when an employee is displaced in the manner set out in the contract. Admittedly none of these events had occurred; therefore, plaintiff was not entitled to displace Branham on swing job No. 12." (*Harrison* v. *Seaboard Airline R. Co.*, 77 Fed. Supp. 511 (May 10, 1948).)

Division "C".

Petitioner's Brief, Page 26.

It is Respondent's contention that the decision of the Circuit Court of Appeals, in the case at bar, is fully supported by the opinion of this Honorable Court in the *Fishgold* case, and while we recognize the fact that the question in this case is a question of Federal Law and one which by reason of its very nature and the wide prevalence of seniority systems in every field of industry has many times arisen, we do respectfully submit, that the opinion of this Honorable Court in the *Fishgold* case, in placing a construction upon the Selective Training and Service Act, is sufficiently broad and explicit so as not to require another opinion for the purpose alone, of elaborating upon that opinion and we further most respectfully submit, that if a thorough study is made of this Court's

opinion in the *Fishgold* case, and the principals laid down in that opinion are applied to any of the cases that have been cited by Petitioner, that there is no necessity of a review of the decision of the Circuit Court of Appeals in this case, for the reasons set out in Petitioner's Petition.

We further most respectfully submit that there is no conflict between the decision of the Circuit Court of Appeals in the instant case and the decisions of other Circuit Court of Appeals to which Petitioner has referred, and as pointed out in this brief, there can be no question but what the conflict referred to by Petitioner, is in effect, nothing more or less than cases that should be distinguished, owing to the diversity of facts, including bargaining agreements and other matters that are found in each of the individual cases and it will be noted that the decisions of the several Circuit Courts of Appeals, including the Circuit Court of Appeals in the case at bar, have followed the *Fishgold* case and have applied the very principals enunciated in that case to the facts as found in the separate several cases cited and referred to by the Petitioner.

What Petitioner is in reality asking for, is something in the nature of an advisory opinion and perhaps, an opinion that would point out the distinguishing features, between the case at bar and the several cases referred to and cited by Petitioner. We do not understand that that is the purpose of a Writ of Certiorari.

We recognize the fact that this brief is perhaps more voluminous that the ordinary brief in proceeding of this nature, but we have accepted a suggestion of this Honorable Court, found in the case of *Furness & Withy Co., Ltd.* v. *Yang-Tsze Insurance Association, Ltd.*, 242 U. S. 430-434, 61 Law Edition 409-414, to the effect that this Court is not aided by oral arguments and necessarily relies in a special way upon petitions, replies and supporting briefs, on petitions for a Writ of Certiorari and we have attempted

to point out to this Honorable Court, where the necessary requisites, to support the granting of a Writ of Certiorari, do not in fact exist and that in view of this Honorable Court's opinion in the *Fishgold* case, which we contend is broad enough, in its construction of the Selective Training and Service Act, to guide the parties and the courts in following the law as laid down by this Court, the necessity does not exist, for a review of the decision of the Circuit Court of Appeals, in the case at bar.

We recognize the fact, and it will always be so, that different state of facts will be found in many cases and will continue to be found in many cases and we again say that whatever facts may appear in the cases of the present or the future, the parent case, the *Fishgold* case, is sufficiently broad to cover any question that may arise.

It is, with great respect, submitted that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, is in complete harmony with the opinion of this Honorable Court in the *Fishgold* case and that while there is a distinction, owing to the facts, in some of the decisions of the Circuit Court of Appeals, we most respectfully submit that there is no conflict and that a Writ of Certiorari should be denied.

H. K. CUTHBERTSON,
Peru, Indiana,
Counsel for Respondent.

HUGH G. FREELAND,
Peru, Indiana,
Of Counsel.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 638

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Petitioner,

vs.

GILMER S. MORRIS,

Respondent.

PETITIONER'S REPLY BRIEF ON ITS PETITION FOR WRIT OF CERTIORARI.

ALBERT H. COLE,
Peru, Indiana,
Counsel for Petitioner.

THE DUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

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Respondent.

PETITIONER'S REPLY BRIEF ON ITS PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The respondent takes exception to the statement in the petition to the effect that Miller, the local chairman of the telegraphers, acting as a personal friend of the respondent, and not under any authorization by the company, mailed the respondent the bulletin or advertisement while he was stationed at Santa Ana, and sets out a considerable portion of Miller's testimony in the course of which he said that, while he did not personally send the bids to the telegraphers on the seniority territory, he mailed this particular bid, the company having ruled that he had to mail them to the men that were off the territory.

An examination of the evidence in its entirety makes it perfectly manifest that what Miller meant was that the

company, under its contract, sent no advertisements to telegraphers not on the territory and ruled that if Miller desired that any be sent to those not on the territory he, and not the company, would have to mail them.

The contract to the effect that "when additional train dispatchers are needed, the positions will be advertised to all employees on the present telegraphers' seniority territory" did not require that bulletins be mailed to those not on the territory by the company or anyone else. It was clearly not the practice of the company to mail bulletins to those not on the territory. Surber testified:

> "Q. There was introduced in evidence Rule 20 (a), providing: 'When additional extra train dispatchers are needed, the positions will be advertised to all employes on the present telegraphers' seniority territory.'
>
> Now, what has been done in that connection by the Railway Company in the way of advertising those positions to persons who are on the seniority list but who were not then on the telegraphers' seniority territory, that is, persons who were absent, on leave or furlough, or sick?
>
> A. The Railway does not send them a bid.
>
> Q. At the time when these positions are advertised, what is the fact as to whether that is at a time when there is need of extra dispatchers?
>
> A. That is true; there is need when they are advertised.
>
> Q. Is it specified in the advertisement that they shall be ready to immediately qualify?
>
> A. I believe in practically every case that I have any recollection of it is stated on the advertisement that applicants will be expected to come to Peru and qualify immediately." (39, 40)

Miller testified:

> "Q. When dispatchers are needed, as I understand it, a bulletin is issued to men on the territory?
>
> A. That is right, the telegraphers' territory.

Q. The telegraphers' territory. What is done, is that posted in offices?

A. Mailed out to each office and to each man in that seniority territory; he gets a copy of it, and he bids.

Q. All right. But it is mailed to those who are then on the territory?

A. Who are on the territory, and I have the right to mail it off of the territory.

Q. You have that right as Chairman of the O. R. T.?

A. Yes, sir.

Q. But the Company mails it only to those who are on the territory, that is right, isn't it?

A. That is their contention, they mail it only to their territory.

Q. That has been the practice?

A. That has been their practice.

Q. You, as Chairman, have at times mailed the bulletin to men who were not on the territory and were on furlough, or leave, or something of that sort?

A. Yes, sir.

Q. In other instances than Mr. Morris', they have refused the bid because he was not on the territory, but in Mr. Morris' case they did accept it and permit him to take the examination; that is true, isn't it?

A. Yes, sir." (28, 29)

We have dwelt at this length upon the question as to whom and upon whose initiative or by whose direction bulletins were sent by Miller because of respondent's insistence that the question as to whether Miller sent the respondent the bid in question as his personal friend or as a result of instructions by the company "is a very important question and quite material in this case," and because it seems not improper to call attention to the error appearing in Finding 12 of the trial court's otherwise quite accurate findings, wherein he found that "The respondent (petitioner herein), *through the local chairman of the Telegraphers' Union*, sends advertisements or bulletins of vacancies of train dispatcher positions to only those telegraphers who are in the territory involved." (169)

The question as to whether the bulletin which respondent received when he was shortly to be discharged was sent by Miller on his own initiative or by direction of petitioner is neither important nor material. Respondent received the bulletin and mailed in his bid. The position was held open until his return, when, after a period of study, he took and passed the examination, qualified, received his promotion, and was given seniority in accordance with the dispatchers' agreement.

Neither the contract nor the prevailing practice required that he be sent a notice of the vacancies which occurred while he was off the territory and in the South Pacific. Moreover the giving of such notice would have been both impossible and futile. As Miller testified, "He was off and nobody could get hold of him when he was in the Pacific." (35) The nation was still at war, and, even if a bulletin could have reached him, it would, of course, have been impossible for the respondent to come to Peru, submit to an examination, and assume the duties of a dispatcher.

The fact remains that, under petitioner's agreement with its telegraphers and the prevailing practice, promotion to the position of dispatcher was not based upon seniority alone, but was dependent also upon a demonstration of capacity, shown by examination and trial, and, under its contract with its dispatchers, seniority as such dates from the time of the qualification. Whether the bulletin, sent to respondent when he was about to be discharged, and pursuant to which he submitted his bid and qualified, was mailed pursuant to the direction of the petitioner, or otherwise, sheds no light on the question as to whether his seniority dates from the time of his qualification or from some earlier date.

Respondent contends that when petitioner restored him to the position which he left at the time of his induction,

and with the seniority which he then held, it did not fully comply with the requirements of the Act because, under the language of the Fishgold case, "He acquires not only the seniority he had,, his service in the armed service is counted as service im the plant so that he does not lose ground by reason of lhis absence." Seniority is, of course, primarily relative. As the time of respondent's induction he held telegrapher seniority as of January 12, 1940, immediately behind the man on the roster last employed before him and immediately ahead of the man next employedl after him. Upon his return he was given seniority as of the same date and in the same relative position on the roster. He automatically had the bemefit of all seniority which was accumulated during his absence. No complaint is made that he did not receive the adlvantage of any pay increases or other benefits which resultted from accumulated seniority. Indeed, he is not seekiing any benefits to which he might be entitled as a result of the mere accumulation of his seniority as a telegrapher. He asks that he be given seniority in another craft as of a date fourteen months prior to the date of his promotion to a position in that craft in the face of the fact that his seniiority alone did not entitle him to the promotion and the agreement creating seniority in the craft to which he was promoted provided that it should date from the time when he passed the examination and qualified.

Respondent seeks support for his contention in Rules 52 and 56 of the Telegraphers' Agreement dealing with "Leave of Absence" and "Incapacitated Employes." The seniority provisions of this agreement relate primarily to the rights of telegraphers, as among themselves, to the various positions as telegrapher on the territory in question. Rule 20 (a) is the only rulle which has any connection with promotion to the position of dispatcher. The language in Rule 52 which respondent has italicized on page 27 of his brief

clearly means that when a telegrapher has been granted a leave of absence of more than sixty days, unless otherwise arranged, he forfeits all rights to his regular position and goes on the extra list, that is with no regular position, but that *when he returns to duty* he has full right to claim any position *as telegrapher* to which the contract and his seniority and ability entitle him.

Rule 56 clearly means that an incapacitated employee, or one unable to fill the position he has been holding, is likewise assigned to the extra list, but with the right then or thereafter to claim any advertised position *as a telegrapher* to which his seniority and merit give him right.

Neither of these rules purport to require that telegraphers absent fom the territory, by reason of leave of absence or incapacity, shall be notified of vacancies in the position of dispatcher or that they shall have the right to bid or qualify therefor.

We shall not extend this brief by any further reference to the authorities which were cited in our original brief in support of our petition. We again insist that, notwithstanding respondent's attempt to distinguish them, they are squarely in point and in direct conflict with the decision of the Circuit Court of Appeals in the instant case.

We think the error of the Circuit Court of Appeals may have been due to a misconception of the meaning of the Dispatchers' Agreement. In the closing paragraph of the opinion it is said: "Both the terms of the union agreement and the custom decreed that the dispatchers be taken after qualification according to their seniority from the telegraphers' roster." This statement is in direct conflict with Rule 5 (a) of the dispatchers' agreement providing that "Seniority as dispatcher will date from date employe passes the required examination and qualifies as dispatcher." After a telegrapher qualifies as dispatcher, seniority on the

telegraphers' roster has nothing to do with seniority as dispatcher save in the single instance where more than one telegrapher qualifies on the same day. The statement of the court which we have quoted disregards the undisputed testimony that seniority as a telegrapher can give a telegrapher seeking a dispatcher's job no advantage whatever over those of less seniority, unless he actually takes the examination and qualifies. These requirements obviously cannot be met *in absentia*.

It is again, and with great respect, submitted that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit should be reviewed and reversed.

ALBERT H. COLE,
Counsel for Petitioner.

In the

Supreme Court of the United States

October Term, 1948

No. 638

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Petitioner,

vs.

GILMER S. MORRIS,

Respondent.

PETITION FOR RECONSIDERATION OF APPLICATION FOR WRIT OF CERTIORARI AND REVERSAL OF ORDER DENYING SAID APPLICATION

Respondent, prior to entering military service, held seniority as a telegrapher on The Chesapeake and Ohio Railway Company. As such he was subject to the working agreement entered into for his benefit, and for the benefit of all telegraphers in his craft, by and between the Order

of Railroad Telegraphers and the Railway Company. Respondent at this time held no seniority as a dispatcher; however, the agreement between the Order of Railroad Telegraphers and the Railway Company provided the means for telegraphers to make application for and an opportunity to qualify as dispatchers, although this agreement could not and did not make any provision for acquiring seniority as dispatcher. The question of when a person acquires seniority as a dispatcher, and rights and privileges pursuant thereto, is covered exclusively by another working agreement entered into, for the benefit of those who are in the dispatchers' craft, by and between the American Train Dispatchers' Association and the Railway Company.

There is no overlapping so far as these two agreements are concerned—each agreement applies only to those employees in its particular craft or class. There are, however, and for many years there have been, some telegraphers who qualify for and hold seniority as dispatcher. When such men qualify and work as dispatcher they are permitted under the telegraphers' agreement to retain their seniority as telegrapher. These employees hold seniority in two crafts; in the dispatchers' craft *they hold seniority from the date they first work, after having qualified as dispatcher.*

Respondent after returning from the Navy qualified as dispatcher and first worked in that capacity on August 3, 1946. He was given seniority on the dispatchers' roster as of that date. Prior to returning from the Navy and during the time that he was absent from the United States one Middlekauf who was junior to respondent on the telegraphers' roster qualified as dispatcher and acquired *seniority as dispatcher* ahead of respondent.

Rule 20(a) of the agreement between the Telegraphers and the Railway Company reads as follows:

"When additional extra train dispatchers are needed the positions will be advertised to all employees on the present telegraphers' seniority roster."

When an additional dispatcher is needed that fact is advertised. In such cases the practice is and always has been for the oldest available telegrapher on the telegraphers' roster, in the point of seniority, to be given the first *opportunity* to qualify to do dispatcher work; thereafter seniority as dispatcher is controlled *solely* by the dispatchers' agreement. Seniority as a dispatcher is in no way affected or influenced by seniority as a telegrapher, except under one peculiar condition not pertinent to this case.

Respondent claims, however, and the lower court held, that because respondent was senior to Middlekauf on the telegraphers' roster, although he qualified and worked as a dispatcher *after* Middlekauf had so qualified and worked, he should because of his telegrapher seniority be given seniority on the dispatchers' roster ahead of Middlekauf.

Respondent's interpretation of the two contracts involved is a novel one and is not in accord with past practice or the interpretation placed upon these contracts by any of the parties hereto. The General Chairmen of the labor organizations which negotiated the contracts, and for many years have participated in their interpretations, have placed the same interpretation upon the portions of these contracts affecting respondent's contention as does the Railway Company. Furthermore, in discussing respondent's position with Mr. G. E. Clark, General Chairman of the Order of Railroad Telegraphers, prior to the institution of this suit, Mr. Clark advised and in fact wrote the Railway Company that he did not agree with the position now taken by respondent as to the meaning of the contract. He has also taken the same position subsequent to the institu-

tion of this suit. Mr. Clark, as the highest officer of his organization on this railroad, not only negotiated and signed the telegraphers' contract here in question, but he was and is the proper representative of the telegraphers' organization to represent them in construing and interpreting this contract. (See copy of letter of G. E. Clark attached.) Likewise, C. W. McClain, General Chairman of The American Train Dispatchers' Association, who as representative of his organization negotiated and signed the working agreement in question between the dispatchers' organization and the Railway Company, has always taken the position that respondent's interpretation of the dispatchers' agreement establishing seniority in that craft was incorrect, and that the position taken by the Railway Company was and is correct. As the ruling of the court below, in effect, changes the seniority provisions of the dispatchers' agreement, General Chairman McClain advises that through counsel he now seeks to intervene in this cause. That the position of all parties responsible for the interpretation of these two contracts is in accord, and that the position taken by respondent is incorrect, is more fully set out by affidavit of M. E. Cridlin, Director of Labor Relations, The Chesapeake and Ohio Railway Company, who is the immediate responsible agent of the Railway Company for negotiating and interpreting the two contracts in question.

It will further be seen from the aforementioned affidavit that while respondent is the only person now making claim, his case is not an isolated one and that there are others in a similar category. It will further be seen that this is a matter of considerable importance not only to the Railway Company, but to the men in both the telegraphers' craft and the men in the dispatchers' craft.

This honorable court's attention is invited to "Petitioner's Reply Brief on its Petition for Writ of Certiorari" which was printed but not filed at the time the order denying certiorari was handed down.

It is again with great respect submitted that respondent's contention is not in accord with the interpretation placed on these contracts by those who negotiated them and are now charged with the primary responsibility of interpreting them; that respondent's interpretation is in conflict with past practice and affects a large number of employees; and finally that the decision rendered by the Seventh Circuit Court of Appeals herein is in conflict with the decisions of at least two other Circuit Courts of Appeals involving substantially this same matter. See *Raulins* v. *Memphis Union Station Co., et al.,* 168 F. 2d 466; *Rose* v. *Texas & N. O. R. Co.,* 171 F. 2d 458; and *Harvey* v. *Braniff,* 164 F. 2d 521.

The judgment of the United States Circuit Court of Appeals for the Seventh Circuit should therefore be reviewed and reversed.

ALBERT H. COLE,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the foregoing petition for rehearing is presented in good faith and not for delay and that the petition is restricted to the grounds specified in paragraph 2 of Rule 33 of the Rules of this Court.

George N. Gardner
Counsel for Petitioner

IN THE

Supreme Court of the United States

October Term, 1948

No. 638

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,

vs.

GILMER S. MORRIS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION OF AMERICAN TRAIN DISPATCHERS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING.

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IN THE

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION OF AMERICAN TRAIN DISPATCHERS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

Now comes the American Train Dispatchers Association, and respectfully moves the Court for leave to file a brief as *amicus curiae* in the above entitled action, and in connection therewith represents to the Court as follows:

The issues involved in this case have a direct and vital bearing on the seniority rights of a large proportion of the workers employed on American railroads, and particularly of thousands of such workers employed in the craft or class of employees known as train dispatchers. Railroad employees in this country are almost entirely organized on a horizontal basis. Both historically and by

virtue of the provisions of the Railway Labor Act, collective bargaining agreements have been negotiated separately for each of the various crafts or classes of employees, and these agreements provide for completely separate and independent seniority subdivisions within a craft or class, based upon work classification.

Frequent questions have arisen and continue to arise with respect to the right of a returning war veteran to be reemployed in a craft or class, or seniority subdivision, different from that in which he was employed at the time of his entry into the armed forces. Such questions directly affect the rights of persons already employed in the craft or class, or seniority subdivision, to which the returning veteran seeks admission.

The American Train Dispatchers Association is a voluntary unincorporated association which represents for the purposes of collective bargaining the vast majority of train dispatchers employed by the railroads of the United States. This case involves the question of the right of a returning war veteran who was formerly employed in a different craft or class, that of telegraphers, to be reemployed, upon his return from the armed forces, in the craft or class of train dispatchers. It further involves the question of his relative seniority standing in the latter craft or class, with respect to other persons previously employed therein, and holding seniority rights as train dispatchers under a collective bargaining agreement negotiated between the American Train Dispatchers Association and the petitioner in this case.

As collective bargaining representative of train dispatchers employed by the petitioner herein, as well as those employed by most of the railroads in the United States, the said Association has been and will be faced with numerous seniority disputes similar to that here involved. Similar disputes have arisen with respect to members of other crafts

and classes of employees in the railroad industry, and have in many instances been determined by the courts in a manner contrary to the decisions of the courts below in the instant case. Unless the issues involved in this case are authoritatively determined by this Court, the American Train Dispatchers Association will be unable to advise its members and those whom it represents as to their seniority rights, and cannot properly fulfill its duties as collective bargaining representative as aforesaid. And in any decision of such issues in this proceeding, the rights of said Association and the employees whom it represents will be determined without opportunity for hearing to them unless the American Train Dispatchers Association is permitted to file a brief and express its views herein as *amicus curiae*.

Dated at Toledo, Ohio, this 16th day of May, 1949.

Respectfully submitted,

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IN THE
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No. 638

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMERICAN TRAIN DISPATCHERS ASSOCIATION AS AMICUS CURIAE

STATEMENT OF THE CASE

The facts involved in this case have already been discussed at length in briefs filed by the parties to this action, and we shall refer to them only to the extent necessary to point up what we believe to be the basic question of law presented.

At the time of his entry into the armed forces, respondent was employed by petitioner as a telegrapher, and as such his seniority rights and the conditions of his employment were fixed by a collective bargaining agreement between petitioner and the Order of Railroad Telegraphers. Under that agreement, when petitioner required additional train dispatchers, the positions were advertised for bid by the telegraphers. Telegraphers bidding on these positions were afforded the opportunity to qualify as train dispatchers in the order of their seniority as telegraphers. If the senior bidder failed to qualify, the bidder with the next highest seniority as telegrapher would attempt to

qualify, and so on until the position was filled. Qualification was accomplished by taking an examination, and then undergoing a brief training or "breaking-in" period under the supervision of regular dispatchers after which the applicant had to satisfy the chief dispatcher as to his capabilities.

While respondent was in the armed forces, several train dispatcher positions were obtained by telegraphers through this procedure. Because of his absence, respondent had no opportunity to bid on or qualify for these positions, some of which were awarded to telegraphers with less seniority as such than that of petitioner. However, when he was about to be discharged from the armed forces, petitioner was informed of and bid on a train dispatcher position then open. Upon receiving his discharge he was reemployed by petitioner in his former position as telegrapher, and approximately two months thereafter was promoted to the train dispatcher position for which he had applied, he having been the senior bidder therefor, and having qualified, by passing the required examination and, as stated in his amended complaint, by spending "in addition to his regular duties as an employee of said railway five hours each night for a period of three weeks under the supervision of a dispatcher." (R. 5.)

In accordance with the provisions of the collective bargaining agreement between petitioner and the American Train Dispatchers Association establishing the rates of pay, rules and working conditions for the craft or class of train dispatchers, petitioner accorded respondent a seniority date as train dispatcher as of August 3, 1946, the date on which he qualified for the position. Respondent contended that under the Selective Training and Service Act of 1940, he was entitled to a seniority date as train dispatcher antedating that of the telegrapher, with less seniority as such than respondent, who first obtained a train dis-

patcher's position after respondent's entry into the armed forces. This action resulted, and the courts below upheld respondent's contention.

QUESTIONS PRESENTED

Only one basic question is involved in this case. Does Section 8 of the Selective Training and Service Act of 1940* entitle a veteran, who has been restored to the same position in private employment which he left to enter the armed forces, to be given a completely different position and seniority status because he could or would have achieved that different position and status had he not entered the armed forces?

This question was answered in the affirmative by both the District Court and the Court of Appeals below. In its opinion the District Court stated:

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*The relevant portions of this section are as follows:

"Sec. 8 (a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. * * *

"(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service—

"(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; * * *

"(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of active military service, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was ordered into such service, and shall not be discharged from such position without cause within one year after such restoration." (50 U. S. C. App., Sec. 308, as amended.)

> "Obviously, during his military service, and because of it, it was impossible for him to take the required examination and to qualify as a dispatcher. *It is my opinion that such military service legally excused the petitioner from the non-performance on his part of the requirement to bid in the advertised vacancies filled by Middlekamp and Adkins and to qualify any sooner than he did qualify.* In order to give effect to the underlying purposes of Section 8 of the statute, we must take the view that the first vacancy occurring after his entry into military service and to which his seniority status entitled him to qualify was kept open for him until he was discharged and actually in a position to take the required examination." (R. 171; emphasis supplied.)

The Court of Appeals below took the same view, and expressly adopted the opinion of the District Court as its own opinion. (R. 188.)

It is our position that the principle thus enunciated is inconsistent with the language of the Selective Training and Service Act and any Congressional intent that may reasonably be inferred from that language. Moreover, the impact of such a principle entitling the millions of returning veterans to receive not merely their former positions, but different positions to which they would or could have been promoted had they not entered the armed forces, with retroactive seniority rights in such promoted positions, would be so widespread as to be almost incalculable.

The question thus presented is one of pressing importance, both in the railroad industry, with its long-established and often intricate systems of seniority, and in other fields of employment. And it involves a legal issue which, in view of conflicting decisions of other courts, can only be authoritatively decided by this Court.

ARGUMENT

Introduction

Although, as we have stated, we are not in accord with the principle adopted by the courts below, it is not our purpose in presenting this brief to enter into any lengthy discussion of the legal issues involved. Some reference to the issues and our position with respect to them is of course inevitable. But our primary aim will be to demonstrate the existence of what we feel to be compelling reasons for a reconsideration by this Court of its previous decision denying certiorari.

It is perhaps of primary importance to all parties concerned that there be a determination by this Court of the issues here involved, irrespective of what that determination may be. The petitioner, the American Train Dispatchers Association, and other railroads and railway labor organzations, have been and are presently involved in numerous disputes and pending or threatened litigation with respect to seniority rights asserted by returning veterans. At the present time and for some time past the principle source of such disputes in the railroad industry, and the litigation which has resulted therefrom, has been the question of promotion rights. This question has not been involved in the several cases decided by this Court with respect to the Selective Training and Service Act, and we believe that a decision in the instant case would have widespread effect as a precedent for the disposition of numerous pending disputes.

Therefore, in our argument we shall merely discuss the question involved in the light of the pertinent language of the Selective Training and Service Act, and then refer briefly to decisions which conflict with that of the Court of Appeals below and which, by reason of such conflict, war-

rant the granting by this Court of the petitioner's petition for rehearing. Several of these decisions have not previously been brought to this Court's attention in this proceeding.

I. THE LANGUAGE OF THE STATUTE

Neither the opinion of the Court of Appeals nor of the District Court below contains any reference to particular provisions of the Act upon which the decision in favor of respondent is predicated. Both courts seem to proceed on the assumption that the "underlying purposes" of the reemployment provisions of the statute were to make the veteran whole for any advantage in connection with his employment, such as opportunity for advancement to a better job, which might have been rendered unavailable to him by reason of his absence in the armed forces. They therefore held that he was "legally excused," by reason of his military service, for any delay occasioned thereby in fulfilling the requirements or achieving the qualifications necessary to obtain such advantage. In other words, he had to be restored not to his former position, but to the position he could or would have been able to attain had he not entered the armed forces.

This assumption by the courts below, that the veteran had to be "made whole" for the time and opportunities lost while he was in military service, is refuted by the express language of the statute. Section 8(b), paragraph (B), of the Act requires that in the case of a veteran who left a position, other than temporary, in the employ of a private employer, "such employer shall restore such person *to such position* . . . " Section 8(c) of the Act further provides that:

> "Any person who is restored to a position in accordance with the provisions of paragraph (A) or

(B) of subsection (b) *shall be considered as having been on furlough or leave of absence during his period of military service . . .* " (Emphasis supplied.)

This language in the statute is directly in conflict with the holding of the courts below that upon being restored to his former position as telegrapher, respondent must then be given the position and seniority status as train dispatcher which he could have attained *not* by being on "furlough or leave of absence" from petitioner's employ, but only by remaining in the active employ of petitioner, "bidding in" the dispatcher's position, and qualifying himself by passing an examination and undergoing a preliminary period of supervised training. In this case the respondent, upon his return from the armed forces, was treated exactly as if he had been on furlough or leave of absence, and it is that treatment of which he complains. In upholding his contentions the courts below said in effect that he should be treated in precisely the opposite manner, that is, as if he had actually been working for petitioner instead of being on furlough or leave of absence.

This Court has not as yet had occasion to pass upon the meaning of the portion of Section 8(c) of the Act which we have quoted above, except in cases where it was completely immaterial whether the veteran's military service was considered as time spent on furlough or leave of absence, or, to use the Court's language in the case of *Fishgold vs. Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 66 S. Ct. 1105, 90 L. Ed. 1230, "as service in the plant." Of course, in the *Fishgold case*, the veteran's seniority, and his rights to continued employment in the event of a layoff after his return from the armed forces, would be the same in either event. But in cases such as the instant one, and other cases involving promotion rights, the distinction between a furlough or leave of absence, and service in the

plant, is vital. As Judge Hand observed in connection with the decision affirmed by this Court in the *Fishgold case,* the language in question was added to the Selective Training and Service Act by an amendment made while the bill was in Congress, so that the veteran:

> " . . . . was given the same status that he would have had, if he had been 'on furlough or leave of absence' while he was in the service. *How far that differed from his position had he remained actively at work, does not appear; but clearly the amendment presupposed that a difference there might be . . .* " (154 F. (2d) 785, 788; emphasis supplied.)

The decision in the instant case depends entirely upon whether or not the distinction referred to is to be drawn. If, in using the words "furlough or leave of absence," Congress intended to distinguish the situation of the reemployed veteran in any way from that of an employee who had remained continuously at work in the active service of his employer, then we believe the decision of the courts below to be *ipso facto* erroneous. And if Congress intended no such distinction, then in view of the widespread importance of this question, and the conflicting court decisions to which we shall subsequently refer, we submit that this matter is one which should be authoritatively decided by this Court.

II. DECISIONS OF OTHER COURTS—THE "FURLOUGH OR LEAVE OF ABSENCE TEST"

The case of *Trischler vs. Universal Potteries, Inc.,* 171 F. (2d) 707, decided December 14, 1948, by the Court of Appeals for the Sixth Circuit, and not previously brought to this Court's attention, stands squarely in conflict with the decision of the Court of Appeals below. In that case, one of the plaintiffs had been an apprentice when he en-

tered the armed forces, and claimed employment as a journeyman upon his return. The remaining plaintiffs, who had not yet obtained apprenticeships at the time of their induction, claimed the right to displace individuals who, during their absence in military service, had received apprenticeships which plaintiffs would have been entitled to receive by virtue of their seniority had they not been absent. (For detailed facts, see District Court opinion, 78 F. Supp. 609.) In affirming the District Court decision denying these claims, the Court of Appeals applied the "furlough or leave of absence" test, ruling that the veterans had failed to establish that, upon being reemployed they had not been considered as having been on furlough or leave of absence during the period of their military service.

In the case of *Spearmon vs. Thompson*, 167 F. (2d) 626, the Court of Appeals for the Eighth Circuit denied the claim of one of the plaintiffs, Delozier, to be reemployed in a mechanic's position to which he would have been upgraded, from his former position as helper, had he not entered the armed forces. Delozier's claim was predicated upon precisely the same theory as that of the plaintiff in the instant case. In denying it, the Court of Appeals stated as follows:

> "* * * Although it is stipulated that had he remained in the position of helper until November 2, 1942, he would on that date have been advanced to the position of mechanic, it is a conceded fact that he occupied the position of helper at the time of his induction. The seniority which accrued to him during the time he served with the armed forces was seniority in the position of helper and not as mechanic. Since he was restored to the position of helper upon his return, he can have no just complaint that his rights under the Selective Training and Service Act have not been fully accorded to him." (167 F. (2d) 631-632.)

It is clear that in the *Spearmon case,* the Court held that the Act did not require Delozier to be made whole for the promotion lost by reason of his absence in the armed forces. Delozier's petition for a writ of *certiorari* was denied by this Court on December 6, 1948. (*Delozier vs. Thompson,* No. 359, October Term, 1948; 93 L. Ed. (Adv.) 126.) The *Spearmon* decision has not previously been brought to the Court's attention in connection with this proceeding.

Among other cases applying the furlough or leave of absence test, and not previously relied upon by petitioner herein, are those in which the courts have held that the question of whether a reemployed veteran is eligible for vacation pay during the first year after his return depends not on whether he would have been so eligible had he remained at work instead of entering the armed forces, but on whether he would have been eligible had he been on furlough or leave of absence during the period of his military service. Among these cases are two decisions by the Court of Appeals for the Second Circuit, *Dwyer vs. Crosby Co.,* 167 F. (2d) 567, and *Siaskiewicz vs. General Electric Co.,* 166 F. (2d) 463. And in a case involving a similar question, *Seattle Star vs. Randolph,* 168 F. (2d) 274, the Court of Appeals for the ~~Tenth~~ NINTH Circuit held that time spent in the armed forces was not to be considered as time worked in private employment for the purpose of computing a reemployed veteran's severance pay. In so holding, the Court said:

> "It is argued that unless the contract be so interpreted as to permit appellees' time in the armed services to be considered as full time employment, said contract conflicts with Section 8(c) of the Selective Service and Training Act and is against public policy. Such a contention is diametrically opposed to the plain reading of Section 8(c) and gives no effect to the requirement that the determination

> shall be made on the basis of the rules applicable at the time of induction to those on furlough or leave of absence. *Feore vs. North Shore Bus Co., Inc.*, 2 Cir., 161 F. 2d 552." (168 F. (2d) 276.)

In addition to the cases noted above, the decisions of the Court of Appeals for the Sixth Circuit in *Raulins vs. Memphis Union Station Co.*, 168 F. (2d) 466, and of the Court of Appeals for the Fifth Circuit in *Harvey vs. Braniff International Airways*, 164 F. (2d) 521, previously relied upon by petitioner herein also adopted the furlough or leave of absence test, and stand in conflict with the decision of the Court of Appeals below. We also direct the Court's attention to the District Court decision in the case of *Huffman vs. Norfolk & Western Ry. Co.*, 71 F. Supp. 564, not previously relied upon by petitioner. The opinion in that case contains an excellent discussion of the question of statutory interpretation here involved, and adopts the furlough or leave of absence principle in determining the rights of the returning veteran.

The decisions of the Courts of Appeals for the Second, Fifth, Sixth, Eighth, and ~~Tenth~~ NINTH Circuits, which we have cited above, stand directly in conflict with the decision of the Court of Appeals below. We believe that those decisions are sound and that the Court below was in error, and that the conflict thus presented should be resolved by this Court.

CONCLUSION

We have examined the brief heretofore filed by counsel for respondent in opposition to the petition for writ of *certiorari*. In that brief it is argued that the decision of the Court of Appeals below is consistent with other decisions adopting the furlough or leave of absence test which we have discussed. We can see no basis whatsoever for that argument. Both courts below clearly held that the respondent was entitled by the Act to receive the position and seniority as a train dispatcher which he would have attained had he not been absent in the armed forces, and that he was to be legally excused for not having done what would have been necessary to obtain that position and seniority had he remained in the employ of petitioner. The adoption of this principle completely destroys any distinction between the status of an employee returning from furlough or leave of absence, and that of one who has remained at service in the plant. If this principle were applied to the cases cited in our argument, the decisions in those cases would have to be reversed.

We have pointed out that the question involved in this case is of widespread importance, and has given rise to numerous disputes affecting seniority rights of thousands of employees, both within and without the railroad industry. At least insofar as the railroad industry is concerned, it is the basis for the majority of the pending and prospective litigation with respect to reemployment rights under the Selective Training and Service Act. In the argument herein, we have shown that the decision of the Court of Appeals below is diametrically opposed to the express provisions of the Act, and is in conflict with decisions of other courts involving the same question.

For the reasons stated above, it is therefore respectfully submitted that the petition for rehearing should be granted, and the question presented should be considered and decided by this Court.

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CERTIFICATE OF SERVICE

I, Frank L. Mulholland, one of the attorneys for the American Train Dispatchers Association, do hereby certify that on the 16th day of May, 1949, I served the attached motion for leave to file brief as *amicus curiae* and brief of *amicus curiae* in support of petition for rehearing upon all parties of record herein by depositing copies thereof in the United States mails, postpaid, addressed to Albert H. Cole, attorney for petitioner, at Peru, Indiana, and H. K. Cuthbertson, attorney for respondent, at Peru, Indiana.

FRANK L. MULHOLLAND.